COUNT II

And the Prosecuting Attorney as aforesaid further charges the defendants, James D. Long, Raymond L. Lorentzen, and Robert Draper, with the crime of Robbery, committed as follows:

That the said defendants, James D. Long, Raymond L. Lorentzen, and Robert Draper, in the County of Spokane, State of Washington, on or about the 5th day of July, 1960, then and there being, did then and there willfully, unlawfully and feloniously take personal property from another, to wit: lawful money of the United States of America, the property of the Downtowner Motel, Inc., a corporation, in the immediate presence of Barry L. Roff, the said Barry L. Roff having the custody and control of said money as agent and employee of the Downtowner Motel, Inc., a corporation, against the will of the said Barry L. Roff and by means of force and violence and fear of immediate injury to the person of the said Barry L. Roff.

JOHN J. LALLY,
Prosecuting Attorney in and for
Spokane County, Washington.
By FRANK H. JOHNSON,
Deputy.

[File endorsement omitted.]

2 [*Duly sworn to by Frank H. Johnson; jurat omitted in printing.*]

3 In the Superior Court of the State of Washington
in and for the County of Spokane

No. 16 603

STATE OF WASHINGTON, PLAINTIFF

v.

RAYMOND L. LORENTZEN, JAMES D. LONG AND ROBERT DRAPER, DEFENDANTS

Motion for new trial

Filed September 15, 1960

Come now the above named defendants and through their attorney, Thomas F. Lynch, move the court for a new trial herein based upon the following grounds:

1. Error of law occurred at the trial and excepted to by the defendants.

2. That the verdict is contrary to law and the evidence admitted at the trial.

THOMAS F. LYNCH,
Attorney for Defendants.

[File endorsement omitted.]

4 In the Superior Court of the State of Washington, in
and for the County of Spokane

No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

JAMES D. LONG, RAYMOND L. LORENTZEN, AND ROBERT DRAPER, DEFENDANTS

Order denying motion for new trial

September 30, 1960

On this 30th day of September, 1960, this cause came regularly on for hearing by the Court on motion of the defendants for a new trial following the verdicts of the jury rendered Sep-

tember 14, 1960, finding each of the above defendants guilty on each of two counts of robbery as charged in the information, the defendants now being each personally present in court and being represented by their attorney, Thomas F. Lynch, the State of Washington being represented by Frank H. Johnson and James J. Gillespie, deputy prosecuting attorneys for Spokane County, and after hearing said motion and the argument of counsel and the Court being fully advised in the premises, it is by the Court

Ordered, That said motion for new trial be and the same is hereby denied as to each defendant and as to both counts of the information.

Done in open Court this 30th day of September, 1960.

HUGH H. EVANS,
Judge.

Attorney FRANK H. JOHNSON,
Deputy Prosecuting Attorney.
Attorney THOMAS F. LYNCH,
Attorney for Defendants.
[File endorsement omitted.]

ORDER

6 In the Superior Court of the State of Washington
in and for the County of Spokane

Case No. 16603

THE STATE OF WASHINGTON, PLAINTIFF

v.

RAYMOND L. LORENTZEN, DEFENDANT

Judgment, sentence and commitment upon verdict of guilty

September 30, 1960

PENITENTIARY

On this 30th day of September, 1960, the above named defendant came into open Court for pronouncement of judgment and sentence, and being asked by the Court if he ..... had any legal cause to show why judgment of this Court should not be pronounced in his ..... case he ..... makes

his ..... statement, the defendant being represented by Thomas F. Lynch his ..... counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Robbery in two counts as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant Raymond L. Lorentzen be punished by confinement at hard labor in the Washington State Penitentiary, for a term of not more than 20 years, on Count I of the Information and a like term of not more than 20 years confinement in the Washington State Penitentiary on Count II of the information and shall pay the costs of this prosecution taxed at $.....

The said sentences to run Consecutively.

That said defendant shall stand committed to said institution until this sentence is complied with.

It is the further order of the Court that .....

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 30th day of September, 1960.

HUGH H. EVANS,
Judge.

CERTIFICATE

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington, for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open Court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this ..... day of ....., 19.....

....
Clerk.

....
Deputy.

[File endorsement omitted.]

PENITENTIARY VERDICT OF GUILTY

7 In the Superior Court of the State of Washington
in and for the County of Spokane

Case No. 16603

THE STATE OF WASHINGTON, PLAINTIFF

v.

ROBERT DRAPER, DEFENDANT

Judgment, sentence and commitment upon verdict of guilty

September 30, 1960

PENITENTIARY

On this 30th day of September, 1960, the above named defendant came into open Court for pronouncement of judgment and sentence, and being asked by the Court if he ..... had any legal cause to show why judgment of this Court should not be pronounced in his ..... case he ..... makes his ..... statement, the defendant being represented by Thomas F. Lynch his ..... counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Robbery in two counts as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant Robert Draper be punished by confinement at hard labor in the Washington State Penitentiary, for a term of not more than 20 years on Count I of the Information and a

like term of not more than 20 years confinement in the Washington State Penitentiary on Count II of the information and shall pay the costs of this prosecution taxed at $ .....

The said sentences to run Consecutively.

That said defendant shall stand committed to said institution until this sentence is complied with.

It is the further order of the Court that .....

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 30th day of September, 1960.

HUGH H. EVANS,
Judge.

CERTIFICATE

STATE OF WASHINGTON,
County of Spokane:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington, for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open Court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this ..... day of ..... 19.....

.....
Clerk.

.....
Deputy.

[File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 201

ROBERT DRAPER AND RAYMOND LORENTZEN, PETITIONERS

vs.

WASHINGTON, ET AL.

On writ of certiorari to the Supreme Court of the State of Washington

INDEX

1 In the Superior Court of the State of Washington
in and for the County of Spokane.

No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

JAMES D. LONG, RAYMOND L. LORENTZEN, AND ROBERT DRAPER,
DEFENDANT

Information

Filed August 3, 1960

(RCW 9.75.010)

COUNT I

Comes now the Prosecuting Attorney in and for the County of Spokane, State of Washington, and charges the defendants, James D. Long, Raymond L. Lorentzen, and Robert Draper, with the crime of Robbery, committed as follows:

That the said defendants, James D. Long, Raymond L. Lorentzen, and Robert Draper, in the County of Spokane, State of Washington, on or about the 5th day of July, 1960, then and there being, did then and there willfully, unlawfully and feloniously take personal property from another, to wit: lawful money of the United States of America, the property of H. E. Swanson, Dr. C. M. Anderson and the TraveLodge Corporation, Inc., a corporation, a co-partnership, doing business as the TraveLodge Motel of Spokane, in the immediate presence of Robert L. Deurbrock, the said Robert L. Deurbrock having the custody and control of said money as agent and employee of H. E. Swanson, Dr. C. M. Anderson and the TraveLodge Corporation, Inc., a corporation, a co-partnership doing business as the TraveLodge Motel of Spokane, against the will of the said Robert L. Deurbrock and by means of force and violence and fear of immediate injury to the person of the said Robert L. Deurbrock.

PENITENTIARY VERDICT OF GUILTY

In the Superior Court of the State of Washington in and for the County of Spokane

Re: No. 16603

RAYMOND LEE LORENTZEN, MOVANT

v.

STATE OF WASHINGTON, RESPONDENT

Notice of appeal

Comes now before this Honorable Court Raymond Lee Lorentzen, the Defendant in Spokane County Cause No. 16603, with written Notice of Appeal of each and every part of the Judgment and Sentence rendered therein by the Honorable Hugh H. Evans, Judge of the above-entitled Superior Court, on September 30, 1960.

This Notice of Appeal is given in compliance with Rules 14, 17 and 46 (1), of Rules on Appeal, Washington Reports, 34 A Wn. 2d, as amended.

Movant further request the court to set a reasonable bail while this matter is pending.

Respectfully submitted.

Raymond Lee Lorentzen
RAYMOND LEE LORENTZEN,
Movant.

Subscribed and sworn to before me on this 20th day of October 1960.

_____

Notary Public in and for the State of Washington, residing in the County of Walla Walla.

10 In the Superior Court of the State of Washington
in and for the County of Spokane

Re: No. 16603

ROBERT A. DRAPER, MOVANT

v.

STATE OF WASHINGTON, RESPONDENT

Notice of appeal

Comes now before this Honorable Court Robert A. Draper, the Defendant in Spokane County Cause No. 16603, with Written Notice of Appeal of each and every part of the Judgment and Sentence rendered therein by the Honorable Hugh H. Evans, Judge of the above-entitled Superior Court, on September 30, 1960.

This Notice of Appeal is given in compliance with Rules 14, 17 and 46(1), of Rules on Appeal, Washington Reports, 34 A. Wn. 2d, as amended.

Movant further requests the court to set a reasonable bail while this matter is pending.

Respectfully submitted.

Robert A. Draper.
ROBERT A. DRAPER,
Movant.

Subscribed and sworn to before me on this 20th day of October, 1960.

F. J. FINK,
Notary Public in and for the
State of Washington, residing,
in the County of Walla Walla.

13 In the Superior Court of the State of Washington in and for the County of Spokane

Cause No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

RAYMOND LEE LORENTZEN, DEFENDANT

Defendant's motion and affidavit for free transcript

Filed October 25, 1960

Comes now the Defendant, Raymond Lee Lorentzen, and purusant to RCW 2.32.240 and Rule 44 of the Washington Rules on Appeal, 34 A Wn. (2nd) 47, moves this Court for an order authorizing and directing the expenditure of County funds for the preparation of a Statement of Facts and Transcript of the record herein, including the trial of the charge of Robbery.

In support of this motion, the Defendant states that he is indigent and is without funds for the preparation of transcript and statement of facts as required on appeal.

The Defendant alleges that the following errors were committed in the trial on the charge of Robbery, to-wit:

(1) Testimony of witnesses contradict each other on the identification of the defendants.

(2) Identification of clothes and weapons in error, no continuence'cy of possession shown, nor ownership established, nor was ownership of these articles by the defendants proven.

(3) Testimony of many witnesses in direct conflict with each other and at times contradict each other as to what happened and how it happened and by whom it was done.

(4) That one witness perjured himself repeatedly and that his testimony was not stricken or thrown out.

(5) That the presumption of innocence was never afforded the defendants.

(6) That the trial Judge was prejudiced against the defendants throughout the entire trial.

14 (7) That the trial judge should have dismissed the case as the defendants are not guilty as charged.

(8) That exhibits were entered over objections that should not have been allowed to be entered.

(9) That testimony was allowed over objections that should not have been allowed.

(10) That defendants were charged with robbing two specific companies that in fact were never proven to have been robbed.

(11) That the defendant was forced to sit at the same table with two prosecutors and a policeman that was subpoenaed as a witness.

(12) That after an order excluding witnesses from the court room the two main witnesses sat in the court room prior to testifying, which had substantial bearing on their testimony.

(13) Unless defendant is provided with a transcript and statement of facts at the Counties expense, he will be unable to prosecute this appeal.

Respectfully submitted.

Raymond Lee Lorentzen.
RAYMOND LEE LORENTZEN.
Pro se.

STATE OF WASHINGTON,
County of Walla Walla, ss:

Raymond Lee Lorentzen, being duly sworn on oath, deposes and says: That he is the defendant named above; That he has read the foregoing motion and affidavit and believes the same to be true.

RAYMOND LEE LORENTZEN.
Raymond Lee Lorentzen.
Affiant.

Subscribed and sworn to before me this 24th day of October, 1960.

F. J. FINK.
Notary Public in and for the State of Washington, residing in the County of Walla Walla.

[File endorsement omitted.]

15 In the Superior Court of the State of Washington
in and for the County of Spokane

Cause No. . . . . in and for the County of Spokane

STATE OF WASHINGTON, PLAINTIFF

v.

ROBERT ALLEN DRAPER, DEFENDANT

Defendant's motion and affidavit for free transcript

Comes now the Defendant, Robert Allen Draper, and pursuant to RCW 2.32.240 and Rule 44 of the Washington Rules on Appeal, 34 A Wn. (2nd) 47, moves this Court for an order authorizing and directing the expenditure of county funds for the preparation of a statement of facts and transcript of the record herein, including the trial of the charge of Robbery.

In support of this motion, the defendant states that he is indigent and is without funds for the preparation of transcript and statement of facts as required on appeal.

The Defendant alleges that the following errors were committed in the trial on the charge of Robbery, to-wit:

(1) Testimony of witnesses contradict each other on the identification of the defendants.

(2) Identification of clothes and weapons in error, no continuency of possession shown, nor ownership established, nor was ownership of these articles by the Defendants proven.

(3) Testimony of many witnesses in direct conflict with each other and at times contradict each other, as to what happened and how it happened and by whom it was done.

(4) That one witness perjured himself repeatedly and that his testimony was not striken or thrown out.

(5) That the presumption of innocence was never afforded the Defendants.

(6) That the trial Judge was prejudiced against the Defendants throughout the entire trial.

16 (7) That the trial Judge should have dismissed the case as the Defendants are not guilty as charged.

(8) That exhibits were entered over objections that should not have been allowed to be enterd.

(9) That testimony was allowed over objections that should not have been allowed.

(10) That Defendant was charged with robbing two specific companies that in fact were never proven to have been robbed.

(11) That the Defendant was forced to sit at the same table with the two prosecutors and a policeman that was subpoened as a witness.

(12) That after an order excluding witnesses from the court-room the two main witnesses sat in the court room prior to testifying which had a substancial bearing on their testimony.

(13) Unless Defendant is provided with a transcript and statement of facts at the county expense, he will be unable to prosecute this appeal.

Robert Allen Draper.
ROBERT ALLEN DRAPER,

STATE OF WASHINGTON.
County of Walla Walla, ss:

Robert Allen Draper, being duly sworn on oath says that he is the Defendant named above; that he has read the foregoing motion and affidavit and believes the same to be true to the best of his knowledge.

Robert Allen Draper.
ROBERT ALLEN DRAPER.

Subscribed and sworn to before me this 24th day of October, 1960.

F. J. FINK.
Notary Public in and for the State of Washington, residing in the County of Walla Walla.

17 In the Superior Court of the State of Washington, in and for the County of Spokane

No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

ROBERT DRAPER, RAYMOND LORENTZEN AND JAMES LONG, DEFENDANTS

Order fixing bond on appeal

November 17, 1960

On this 17th day of November, 1960, this cause came regularly on for hearing by the Court on Notice of Appeal to the Supreme Court by each defendant from Judgment and Sentence of conviction entered September 30, 1960, after verdicts of guilty as to each defendant on each of two counts of robbery, and after hearing said matter and the argument of counsel and the Court being fully advised in the premises, it is by the Court

Ordered, That said Bond on Appeal be and the same is hereby fixed in the sum of Fifteen Thousand ($15,000.00) Dollars as to each defendant.

Done in open Court this 17th day of November, 1960.

HUGH H. EVANS,
Judge.

Attorney FRANK H. JOHNSON,
Deputy Prosecuting Attorney.

[File endorsement omitted.]

ORDER

19 In the Superior Court of the State of Washington
in and for the County of Spokane

Cause No. 16603

RAYMOND LEE LORENTZEN, APPELLANT

v.

STATE OF WASHINGTON, RESPONDENT

Appellant's amended notice of appeal from two robbery convictions

Filed November 21, 1960

Comes now, the Appellant, Raymond Lee Lorentzen, an indigent, proceeding in forma pauperis and Pro se, who now is residing in custody at Washington State Penitentiary at Post Office Box 520, Walla Walla, Washington. Appellant was charged with two counts of Robbery.

On September 30, 1960, Appellant was sentenced by the trying Court to two consecutive twenty (20) year sentences to be served at the Washington State Penitentiary.

The Defendant, now the Appellant is presently in custody at the Washington State Prison at Walla Walla, Washington, and Appellant gives notice that he wants, intends and is trying Pro se, to appeal his case and judgment.

Respectfully submitted.

Raymond Lee Lorentzen.
RAYMOND LEE LORENTZEN,
Appellant

STATE OF WASHINGTON,
County of Walla Walla, ss:

Raymond Lee Lorentzen, being duly sworn on oath, says: That he is the Appellant named above; that he has read the foregoing motion and affidavit and believes the same to be true to the best of his knowledge.

Raymond Lee Lorentzen,
RAYMOND LEE LORENTZEN,
Affiant.

Subscribed and sworn to before me on this 17th day of November, 1960.

F. J. FINK,
Notary Public in and for the State of Washington, residing in the County of Walla Walla.

[File endorsement omitted.]

20 In the Superior Court of the State of Washington in and for the County of Spokane.

Cause No. 16603

ROBERT ALLEN DRAPER, APPELLANT-MOVANT

v.

STATE OF WASHINGTON, RESPONDENT

Appellant's amended notice of appeal from two robbery convictions

Filed November 21, 1960

Comes now the Appellant, Robert Allen Draper, and indigent, proceeding in forma pauperis and Pro se, who now is residing in custody at the Washington State Penitentiary at Post Office Box 520, Walla Walla, Washington. Appellant was charged with two counts of Robbery.

On September 30, 1960, Appellant was sentenced by the trying Court to two consecutive twenty (20) year sentences to be served at the Washington State Penitentiary.

The Defendant, now the Appellant is presently in custody at the Washington State Prison at Walla Walla, Washington, and Appellant gives notice that he wants, intends and is trying, Pro se, to appeal his case and judgment.

Respectfully submitted.

Robert Allen Draper,
ROBERT ALLEN DRAPER,
Appellant-Movant.

STATE OF WASHINGTON,
County of Walla Walla, ss:

Robert Allen Draper, being duly sworn on oath, says: That he is the Appellant named above; that he has read the foregoing motion and affidavit and believes the same to be true to the best of his knowledge.

Robert Allen Draper,
ROBERT ALLEN DRAPER,
Affiant.

Subscribed and sworn to before me on this 17th day of November, 1960.

F. J. FINK,
Notary Public in and for the State of Washington, residing in the County of Walla Walla.

[File endorsement omitted.]

21 In the Superior Court of the State of Washington
in and for the County of Spokane

No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

RAYMOND LORENTZEN, JAMES D. LONG, & ROBERT DRAPER,
DEFENDANTS

Order for return of defendants from penitentiary

November 22, 1960

On this 22d day of November 1960, this cause came regularly on for hearing by the Court on defendants' motion for free

transcript and statement of facts after a notice of appeal given by each defendant, and the judgment, sentence and commitment to the Washington State Penitentiary heretofore imposed by the Court finding them guilty of the crimes of Robbery in two Counts, it appearing that the hearing on the defendants' motion for free transcript will be held at 9:30 a.m., Monday, November 28, 1960, before the Honorable Hugh H. Evans, Judge of the above entitled Court, and that the defendants are now in the Washington State Penitentiary and should be returned for said hearing, and after hearing said motion and the argument of counsel and the Court being fully advised in the premises, it is by the Court

Ordered, That said motion be and the same is hereby granted;

It is ordered that the defendants, Raymond Lorentzen, James D. Long, and Robert Draper shall be returned by the Spokane County Sheriff or his authorized deputy, from the state penitentiary at Walla Walla, Washington, to the Spokane County Jail, and after disposition of said matter, to be returned to the Washington State Penitentiary.

Done in open Court this 22d day of November, 1960.

HUGH H. EVANS,
Judge.

Presented by:
FRANK H. JOHNSON,
Deputy Prosecuting Atty.
[File endorsement omitted.]

ORDER

22 In the Superior Court of the State of Washington
in and for the County of Spokane

No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

RAYMOND L. LORENTZEN, JAMES D. LONG, AND ROBERT A. DRAPER, DEFENDANTS

Counter-affidavit resisting motion for free transcript

Filed November 28, 1960

STATE OF WASHINGTON,
County of Spokane, ss:

Frank H. Johnson, being first duly sworn on oath deposes and says: That he is a Deputy Prosecuting Attorney in and for Spokane County, Washington, and as such represented the State of Washington in the trial of the above entitled action along with Deputy Prosecuting Attorney James J. Gillespie; that the defendants, Raymond L. Lorentzen, James D. Long and Robert A. Draper, were represented during the trial by Attorney Thomas F. Lynch, a competent attorney with long experience in the trial of criminal actions; that each defendant was charged by information with two counts of armed robbery; that the defendants were jointly tried before the Honorable Hugh H. Evans, Judge of the Superior Court for Spokane County, sitting with a jury, on September 12 to 14, 1960;

That the evidence offered by the State showed clearly and without contradiction that at approximately 1:50 a.m. on July 5, 1960, the defendants James Long and Raymond Lorentzen, each being armed with a loaded gun, held up the night clerk of the TraveLodge Motel, located in downtown Spokane, Washington, and took from the office of the motel, at gun point, approximately $500.00 in currency; that before leaving the motel, the defendant James Long slugged Robert

L. Deurbrock, the night clerk, on the back of the head while Deurbrock's back was turned to Long, and inflicted upon Deurbrock a scalp wound requiring four stitches and knocked Deurbrock temporarily unconscious; that while the
23 defendants Long and Lorentzen were committing this holdup, their co-defendant, Robert Draper, by prearrangement, waited outside the motel in Lorentzen's automobile to act as driver of the get-away car, in company with an accomplice, Robert Jennings; that when the defendants Lorentzen and Long returned to the automobile, Draper immediately drove to the Downtowner Motel, again by prearrangement, and at approximately 2:00 a.m., of the morning of July 5, 1960, James Long and the accomplice Robert Jennings held up at gun point one Barry Roff, the night clerk at the Downtowner Motel, and obtained from this robbery approximately $1,800.00 in currency, money orders and credit vouchers; that again at the Downtowner Motel, the night clerk, Barry Roff, was slugged on the back of the head with a gun by the accomplice Robert Jennings:

That as Jennings and Long ran hastily from the Downtowner Motel to Lorentzen's waiting automobile, which was still being driven by Draper, a police officer, Donald Rafferty, observed them run and get into the car, and followed them as the car drove off, and when the robbery alarm was broadcast a minute later over the police radio, Officer Rafferty pursued the vehicle and was joined in this pursuit by Officer Robert Bailor; that this pursuit took place through the downtown area of Spokane at speeds up to 60 miles per hour, with the defendants firing their loaded pistols repeatedly at the pursuing police vehicles; that the chase ended only when Officer Bailor's police car rammed the get-away car at the intersection of Third and Wall;

That the defendants James Long and Raymond Lorentzen were captured at the scene, in the get-away car along with all of the money, money bags and other property which was identified at the trial as coming from the Downtowner and TraveLodge Motels; that the defendant James Long immediately thereafter confessed to his participation in both robberies;

That the defendant Robert Draper and the accomplice Robert Jennings escaped from the vehicle after it was rammed, and made their way back to the Davenport Motel, where the de-

fendant Draper had a room under an assumed name; that the defendant Draper the next day took a Northwest Airlines commercial airplane flight to Seattle, using the name "J. Radde" and was apprehended the following day in Seattle with the passenger copy of the air line flight ticket still in his possession;

That Robert Jennings entered a plea of guilty to two counts of armed robbery on July 19, 1960, and was sentenced by the Superior Court for Spokane County to not more than 20 years on each count, to run consecutively; that the said Robert Jennings testified as a witness for the State at the trial of the above three defendants and described how these defendants had driven to his home in Addy, Washington, approximately 50 miles north of Spokane, on the afternoon before the robberies (which was confirmed by the testimony of the mother of Robert Jennings), and that they had brought him back to Spokane a few hours before the robberies; that Jennings further testified as to how the robberies were initially planned by the four men in Draper's hotel room, and then how the four men made a test run past the two motels to acquaint themselves with the area and to determine the amount of time needed to commit the robberies;

As to the motion of each defendant for a free transcript, the grounds alleged by each defendant are identical and in answer to the claimed errors and irregularities your affiant denies each and every claim of error and more particularly denies that there was any material contradiction either in testimony or identification of the parties, and denies that there was any perjury committed or that the trial judge was in any wise prejudiced against any of these defendants at any time in the trial; your affiant further declares that the presumption of innocence was fully accorded to these defendants not only during the trial but in Instructions Nos. 2 and 4 given to the jury in this cause; that the testimony specifically established the name and legal entity of each business that was robbed, the person that was held up, the owners of the money, and the manner in which the robbery was committed; that the said claimed errors in the motion of each of the defendants for a free transcript and statement of facts are so vague and nebulous

that they are incapable of precise answer, but that no exhibit or testimony was improperly admitted in evidence, and no conceivable prejudice resulted to the defendants in the fact the parties to this action sat at the same counsel table; that to your affiant's recollection no witness sat in the courtroom prior to testifying and that as each defendant rested without testifying or presenting any evidence whatever, the guilt of each defendant in the participation in each crime was established in your affiant's opinion not just beyond a reasonable doubt, but overwhelmingly. Your affiant respectfully submits that there is no merit in any of the allegations of error made by each defendant, that these are frivolous appeals, and that the motions for free transcript and statement of facts should be denied.

FRANK H. JOHNSON.

Subscribed and sworn to before me this 25th day of November, 1960.

FRANCIS E. LOWER,
Notary Public in and for the State of Washington, residing at Spokane.

Copy received this 25th day of November, 1960.

THOMAS F. LYNCH,
Attorney for Defendants.

[File endorsement omitted.]

26 In the Superior Court of the State of Washington
in and for the County of Spokane

No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

RAYMOND L. LORENTZEN, ROBERT DRAPER AND JAMES D. LONG, DEFENDANTS

Findings of fact and conclusions of law

December 12, 1960

The above entitled cause came regularly on for hearing on the 28th day of November, 1960, on the motion of each defendant in forma pauperis for a free transcript and statement of facts, each defendant being personally present in Court and Thomas F. Lynch appearing as Court appointed counsel for each defendant, and Frank H. Johnson, Deputy Prosecuting Attorney appearing as counsel for the plaintiff, and the Court having examined the files and affidavits and having heard the argument of counsel and the individual argument of the defendant, Robert A. Draper, the Court being fully advised in the premises, now, makes findings of fact as follows:

FINDINGS OF FACT

I

That each defendant was jointly charged by information filed in the Superior Court of Spokane County, with two counts of Robbery and said defendants were jointly tried before jury in the above entitled Court on September 12th, 13th and 14th, 1960.

II

That on September 14, 1960, the jury rendered verdicts of guilty as to each defendant on both counts of the information; that each of said defendants were thereafter on September 30, 1960, sentenced to serve not more than 20 years in the Washington State Penitentiary on each count, said sentences to run consecutively.

27

III

That the evidence established that the TraveLodge Motel is owned and operated as a motel business in Spokane, Washington, by a partnership consisting of H. E. Swanson, Dr. C. M. Anderson, and the TraveLodge Corporation, Inc., a corporation, who do business as a co-partnership under the name of the TraveLodge Motel; that at approximately 1:50 a.m., of July 5, 1960, Robert Deurbrouck was the employee of the TraveLodge Motel and the night clerk in charge of the property and business of the TraveLodge Motel; that at that time and place the defendants, Raymond Lorentzen and James D. Long, entered the TraveLodge Motel each armed with a loaded gun and at gunpoint took from Robert Deurbrouck the approximate sum of $500.00 in lawful money of the United States which was the property of and belonged to the TraveLodge Motel; that the defendant, James D. Long, then struck Robert Deurbrouck on the back of the head with the gun held by the said James D. Long, and inflicted upon the said Robert Deurbrouck, a scalp wound which required four stitches to close.

IV

That the defendants, Raymond Lorentzen and James D. Long, then ran to an automobile waiting outside the TraveLodge Motel in which by prearrangement, the defendant, Robert Draper, was driving said automobile, which belonged to the defendant, Raymond Lorentzen, and in which the accomplice Robert Jennings, also waited; that the defendant Robert Draper by prearrangement then drove said automobile to the DownTowner Motel which is a corporation engaged in the motel business; that the defendant James Long and the accomplice Robert Jennings, then entered the DownTowner Motel each armed with a loaded gun and the accomplice held up the night clerk and employee of the DownTowner Motel, one Barry Roff, who was then in charge of, the business and property of the DownTowner Motel and took by force and violence, the approximate sum of $1800.00 in lawful money of the United States, the property of the DownTowner Motel, Inc., a corporation; that the accomplice, Robert Jennings, then struck the said Barry Roff over the back of the head with the

gun held and used by the said Robert Jennings; that the defendant, James Long, and the said accomplice, Robert Jennings thereupon ran to the waiting automobile which
28 the defendant Robert Draper was driving, and in which the defendant Raymond Lorentzen was waiting.

V

That as Raymond Lorentzen and Robert Jennings ran from the DownTowner Motel to the aforementioned waiting automobile, they were observed by police officer Donald Rafferty, who was on duty as a police officer in the downtown area of Spokane at that time; that officer Rafferty then followed said defendants for a few blocks until he was advised by the police radio on his vehicle, of the above described robbery of the DownTowner Motel; that he thereupon attempted to stop the vehicle in which the above three defendants and the accomplice Robert Jennings were riding, but the defendant, Robert Draper, accelerated his vehicle and attempted to flee; that officer Rafferty then gave chase to this vehicle through downtown streets of Spokane at speeds up to 60 miles per hour and was joined in this pursuit by another police car driven by officer Robert Bailor; that in the course of this pursuit, the defendants fired an unknown number of shots at the pursuing police vehicles; that at the intersection of Third and Wall Streets in Spokane, the vehicle occupied by the defendants was rammed from behind by the police car driven by officer Bailor which caused the defendants' vehicle to go out of control and stop in a parking lot on the northeast corner of Third and Wall Streets in Spokane.

VI

That the defendants, James Long and Raymond Lorentzen, were each apprehended in this vehicle with the proceeds of the aforementioned robberies including envelopes, receipts, and papers identified as belonging to and coming from the said motels recovered in said vehicle. The defendant James D. Long immediately thereafter admitted his participation in the above described robberies.

VII

That the defendant, Robert Draper, and the accomplice, Robert Jennings, fled from said vehicle and returned to the Davenport Hotel in Spokane, Washington, in which Robert Draper had rented a room under the name "J. Radde;" that at approximately noon of July 5, 1960, the de-
29 fendant, Robert Draper, left the Davenport Hotel and flew to Seattle on a Northwest Air Lines commercial plane, where he was apprehended several days later with the passenger's flight coupon still in his possession; that said passenger's flight coupon is in evidence at exhibit 26 and 26a, and that the Davenport Hotel registration of the defendants, Raymond Lorentzen, James Long, and Robert Draper, the latter using the name of "J. Radde," is in evidence as exhibits 23, 24, and 25.

VIII

That the accomplice, Robert Jennings, entered a plea of guilty to the aforementioned two counts of Robbery in the Superior Court of Spokane County, on July 19, 1960, and was sentenced by the Honorable Louis F. Bunge, Judge of the above entitled Court, to not more than 20 years confinement in the Washington State Penitentiary on each count, said sentence to run consecutively; that the said Robert Jennings testified as a witness for the State at the trial of the three co-defendants, and testified that the three defendants had driven to Robert Jennings' home near Addy, Washington, approximately 60 miles north of Spokane, in the late afternoon of July 4, 1960, and that the defendants persuaded him to return to Spokane with said defendants; that said testimony was confirmed by testimony of Mrs. Gladys Allen, the mother of the said Robert Jennings; that said Robert Jennings further testified that the robberies of the TraveLodge Motel and the DownTowner Motel were jointly planned by the three defendants and himself in the Davenport Hotel room occupied by the defendant, Robert Draper, approximately several hours before the robberies; that the four men then travelled the route later taken in the actual robberies for the purpose of planning and timing said robberies.

IX

That when the State rested its case in chief, the defendants rested their case without taking the witness stand or offering any evidence.

X

That the motions of each defendant for free transcript and statement of fact are identical in substance and the Court finds each assignment of error by each defendant without merit as follows:

"A. That, as to assignments of error one and three, no showing whatever has been made of any conflict or contradiction in the testimony of any witness and the Court finds that no such material conflict or contradiction was present in the trial.

"B. As to assignments of error two and eight, relating to identification and admission of exhibits, each exhibit was properly identified at the trial and was material and relevant to the issues and that the objection to exhibit two, the gun identified by the accomplice Robert Jennings, as one used in the holdup, as well as the objections to remaining exhibits offered, goes to the weight the jury should place upon the exhibits rather than their admissibility.

"C. As to assignment of error number four, no showing of any perjury has been made beyond the bare assertion by the defendants of perjury, and the Court finds there is no basis in fact that has been presented to establish such claim.

"D. As to assignment of error five, the Court finds that the jury was specifically instructed in instructions number two and four, as to the presumption of innocence and the burden of proof, and the jury was further reminded by counsel in the selection of the jury of said matters.

"E. As to assignment of error number six, no showing whatever has been made of any prejudice against the defendants, and no such prejudice existed.

"F. As to assignment of error number seven, the Court finds the evidence offered by the State against these defendants overwhelming as to their guilt of the crimes charged.

"G. As to assignment of error number nine, no showing has been made by these defendants as to any testimony that was

improperly admitted, and the Court finds that no such testimony was admitted.

"H. As to assignment of error number ten, the Court finds that the uncontradicted evidence of the State has es-
31 tablished the legal nature of each motel business and the ownership of the property that was taken in the robberies, by the employees of said business, and one of the owners and co-partners of the Travelodge Motel, Mr. H. E. Swanson.

"I. As to assignment of error number eleven; that all counsel and defendants at this trial participated therein from one counsel table adequate to provide all parties with necessary working room, and that no conceivable prejudices resulted to these defendants from such fact, and that no demonstration by any participant in the trial was evident to the Court or ever brought to the attention of the Court during any time of the trial.

"J. As to assignment of error number twelve, the Court finds that its attention was never called to the presence of any witnesses in the courtroom after the rule of exclusion had been invoked, and to the Court's knowledge, no such witnesses were present in Court except when they testified and that, if such presence were established, no showing of prejudice to the defendants has been made."

XI

The Court further finds that assignments of error, one, three, four, five, six, eleven and twelve were never presented to the Court at any stage of the trial or judgment and sentence in any form or fashion.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I

That the claims of error of each defendant are frivolous, groundless and without any basis in fact or law.

II

That the defendants do not allege or substantiate any factual basis for their assignments of error beyond the bare assertion of such claims.

III

That the assignments of error as set out by each defendant are patently frivolous; that the guilt of each defendant as to each count of Robbery was established by overwhelming
32 evidence, and that accordingly the furnishing of a statement of facts would result in a waste of public funds.

Done in open court this 12th day of December, 1960.

HUGH H. EVANS
Judge

Presented by:
FRANK H. JOHNSON,
Deputy Prosecuting Attorney

[File endorsement omitted.]

33 In the Superior Court of the State of Washington in and for the County of Spokane

No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

RAYMOND L. LORENTZEN, ROBERT DRAPER, AND JAMES D. LONG, DEFENDANTS

Order denying motion for free transcript and statement of facts

December 12, 1960

On this 12th day of December, 1960, this cause came regularly on for hearing by the Court on motion of each defendant in forma pauperis for a free transcript and statement of facts, the Court having heard the argument of counsel, Thomas F. Lynch, Court appointed counsel for the defendants, and Frank H. Johnson, Deputy Prosecuting Attorney, for the State of Washington, and each defendant being personally present in Court on the date of said hearing, November 28, 1960, and after hearing said motion and after having made findings of facts and conclusions of law and having heard the argument of counsel and the Court being fully advised in the premises, it is by the Court

Ordered, That said motion for free transcript and statement of facts be and the same is hereby denied as to each defendant.

Done in open Court this 12th day of December, 1960.

HUGH H. EVANS,
Judge.

Thomas F. Lynch,
THOMAS F. LYNCH,
Counsel for Defendants.
Attorney FRANK H. JOHNSON,
Deputy Prosecuting Attorney.

ORDER

[File endorsement omitted.]

34 In the Superior Court of the State of Washington in and for the County of Spokane

Superior Court No. 16603

Supreme Court No. 35914

STATE OF WASHINGTON, PLAINTIFF

v.

JAMES D. LONG, RAYMOND L. LORENTZEN AND ROBERT DRAPER, DEFENDANTS AND RELATORS

THE SUPERIOR COURT OF SPOKANE COUNTY, HON. HUGH H. EVANS, JUDGE, RESPONDENT

Judge's certificate

February 27, 1961

I, Hugh H. Evans, Judge of the Superior Court of the State of Washington in and for Spokane County, do hereby certify that I am the Judge before whom certain proceedings were had and done in the above entitled cause, and also the Judge to whom is directed that certain Writ of Certiorari issued by and out of the Supreme Court of the State of Washington in its Cause No. 16603 entitled State of Washington, Plaintiff, vs. James D. Long, Raymond L. Lorentzen and Robert Draper,

Defendants and Relators. The Superior Court of Spokane County, Hon. Hugh H. Evans, Judge, Respondent, and

I further certify that the foregoing and attached record is a full, true and correct transcript of so much of the record in said cause as was before and considered by me in rendering the decision therein and which I am by said Writ of Certiorari directed to certify to the Supreme Court of the State of Washington.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 27th day of February, 1961.

[SEAL]

HUGH H. EVANS,
Judge of the Superior Court
of the State of Washington
in and for the County of Spokane.

35 In the Superior Court of the State of Washington
in and for the County of Spokane

Superior Court No. 16603

Supreme Court No. 35914

STATE OF WASHINGTON, PLAINTIFF

v.

JAMES D. LONG, RAYMOND L. LORENTZEN AND ROBERT DRAPER,
DEFENDANTS & RELATORS

THE SUPERIOR COURT OF SPOKANE COUNTY,
HON. HUGH H. EVANS, JUDGE, RESPONDENT

Clerk's certificate

February 27, 1961

STATE OF WASHINGTON,
County of Spokane, ss:

I, Geo. E. Fallquist, County Clerk of Spokane County, and ex officio Clerk of the Superior Court of the State of Washington, in and for the County of Spokane, do hereby certify that the foregoing is a full, true and correct transcript of so much

of the records and files in Spokane County cause No. 16603 entitled State of Washington, Plaintiff, vs. James D. Long, Raymond L. Lorentzen and Robert Draper, Defendants & Relators, the Superior Court of Spokane County, Hon. Hugh H. Evans, Judge, Respondent, as I have been directed by the Plaintiff to transmit to the Supreme Court of the State of Washington, as a transcript of record to be used in answer to the Writ of Certiorari issued by and out of the Supreme Court on the 14th day of February, 1961, and returnable on the 10th day of March 1961 at 10:00 o'clock a.m.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Superior Court this 27th day of February A.D. 1961.

[SEAL]

GEO. E. FALLQUIST,
Clerk.
By D. J. SUTHERLAND,
Deputy.

36 In the Superior Court of the State of Washington
in and for the County of Spokane

No. 16603

STATE OF WASHINGTON, PLAINTIFF

v.

JAMES D. LONG, RAYMOND L. LORENTZEN AND ROBERT DRAPER, DEFENDANTS

Before Hon. HUGH H. EVANS, J.

Transcript of hearing on defendants' motion in forma pauperis for free transcript and statement of facts

November 28, 1960

Appearances

For the plaintiff: Mr. Frank H. Johnson, Deputy Prosecuting Attorney for Spokane County Court House, Spokane, Washington. For the defendants: Mr. Thomas F. Lynch, Attorney at Law, Paulsen Building, Spokane, Washington.

Proof of service [omitted in printing].

[File endorsement omitted.]

37 The COURT. State of Washington versus James D. Long, Raymond L. Lorentzen, and Robert Draper.

Mr. JOHNSON. Yes. Your Honor, on September 30th, 1960, after verdicts of the jury finding each of the three defendants guilty of the crime of robbery in two counts, the defendants were sentenced by the Court, each to receive not more than 20 years in the Washington State Penitentiary, sentences to run consecutively on each count of the information charging them with the crime of robbery.

Subsequently each of them filed notice of appeal, motions and affidavits for free transcript alleging certain grounds.

The defendants are present in court at this time, with their counsel, Mr. Thomas Lynch, who represented them at the trial.

Today's hearing, your Honor, is for the purpose of arguing the defendants' motion and affidavit for free transcript.

The COURT. Mr. Lynch.

Mr. LYNCH. I have been informed by the defendants, particularly by the defendant Draper, that he wishes to handle his own appeal, and I have been informed by letter from the defendants that none of them desire me to defend them any longer or any further in this matter.

I know that your Honor has indicated to me that you want me to proceed with this, but I think the defendant Draper particularly wants to inform the Court of that himself.

The COURT. Mr. Draper, Mr. Lorentzen, and Mr. Long, I would like to explain this, by going back to the beginning

38 of this trial, which was the first time this Court was acquainted with this matter in any way.

When the case was assigned to this Court for trial, you all indicated that you had no funds to employ your own counsel, Mr. Lynch at the time.

In order to proceed with the case and give to you the benefit of the conferences that you had with Mr. Lynch, and the advice which you had received from him, and knowing that Mr. Lynch is a competent, capable, and experienced trial attorney, with particular experience in the field of criminal law, I appointed Mr. Lynch to represent you during that trial.

Ordinarily, the courts do not appoint counsel of the defendants' own selection, but I did in this case.

As to your petition for a free transcript, which is the only purpose of this hearing today, the law requires that an attorney be appointed. That is for the very obvious reason that some rather technical questions of law are involved in such a hearing.

Now, I have a letter from Mr. Lorentzen saying after he received the notice of the appointment of Mr. Lynch for this hearing, that he did not wish Mr. Lynch to represent him. Mr. Lorentzen did not give any reasons for that, and inasmuch as the law requires that an attorney be appointed, I will appoint an attorney, and it will be his obligation, as such an attorney, to protect your rights in this hearing, and, if there is an appeal, then on the appeal, in order that the matter proceed in an orderly fashion.

The law requires the appointment of an attorney, but not an attorney of your choice. I am appointing Mr. Lynch because he is a competent, capable, and experienced attorney
39 in these matters, and we will proceed from there.

Mr. DRAPER. Your Honor, may I speak?

The COURT. Yes.

Mr. DRAPER. The law recommends that I have an attorney, but it does not require it. I can represent myself, and I wish to avail myself of that opportunity here, so that I will not lose any rights by their being overlooked or neglected.

The COURT. Very well.

The motions of all defendants are the same. Mr. Lynch, what showing do you wish to make at this time as to why the defendants should have a free statement of facts or transcript?

Mr. LYNCH. In the first place, your Honor, as to the indigency of the defendants, I am sure that the prosecuting attorney does not contest that matter.

These defendants own no property, they have no means of obtaining any funds with which to proceed with any appeal, nor did they have any at the time of the trial with which to employ or to pay counsel.

I have been in touch with the wife of Mr. Lorentzen, she was here from the first day of the trial itself. She has been unable to raise any money to assist in any appeal, whatsoever.

I have checked with all the defendants, they do not have any property. Mrs. Draper obtained a deed from Mr. Draper

to an interest in some property in Portland in connection with a divorce action before this trial. I think they have four or five children.

Mr. DRAPER. Five.

Mr. LYNCH. I talked to this lady, she has called me several times. She was determined to go ahead with the divorce action and instituted it before the trial was had here. Apparently they had some small equity in a place in Portland, which was deeded to her personally, and I presented that deed to Mr. Draper and took his acknowledgment myself.

The COURT. Excuse me, Mr. Lynch, for just a minute. Is the state making any contention here that these men are not indigent?

Mr. JOHNSON. No, I think we can stipulate that they are indigent.

The COURT. The Court will so find. You may proceed, Mr. Lynch.

Mr. LYNCH. Now, your Honor, as to the case of Woods versus Wray, 338 Pacific (2nd), at 332, I think that is pretty well covered by the motions here and some of the matters that I raised on the motion for new trial in this matter as to the identity of the owner of the money, the corporation involved, the rights of certain individuals under the law to the right of possession of this money, their attempt to show that they were actually deprived of it by force and fear. I raised that at the time of the trial, and it is raised here substantially in Point No. 10, of these points raised here by the defendants, that the defendant is charged with robbery but it has never been proven that anyone was robbed. I raised that point at the time of the trial and at the time of the motion for new trial.

The defendants have set out a number of points here, one of which is that they deny that the evidence is sufficient to warrant the verdicts that the jury reached.

I might say, particularly, with regard to one of the defendants, Mr. Draper, who has not been identified in any way except through the testimony of the accomplice, Mr. Jennings—and the point is raised here that the

testimony of Mr. Jennings was contradictory and perjury as well.

Now, your Honor, as I understand the case of Woods versus Rhay, the Court cannot deny an indigent defendant his right to a review of the evidence, if in fact he is indigent, and he challenges the sufficiency of the evidence to uphold the verdict.

Under that case this is narrowed down, and also under Farley versus U.S., which is in 1 Law Edition (2nd) 1529, that it is always a matter of due process, if the individual is indigent and challenges the sufficiency of the evidence to sustain the verdict, the right to review is always one that the law cannot deny.

In Woods versus Rhay, they set out certain steps, although they don't say this is mandatory but they do prescribe the following procedures—your Honor is familiar with that case I am sure, in which certain steps are set out which should be taken in this case or any case where an indigent defendant makes application for review of his conviction.

Now, your Honor, I don't know what testimony would be necessary in reviewing the contentions made by the defendants here—and there are 13 of those contentions—but it would appear that if those points were to be reviewed, it would take substantially all of the record.

Your Honor recalls that there was objection made to the introduction of certain exhibits, the gun, the coat claimed to that of Mr. Lorentzen, which was found with some money in it. It appears to me that it would take most of the
42 record to review these points.

The record is, I know, voluminous.

Going back to the case of Woods versus Rhay, I don't know what discretion that leaves the trial court. The Federal Statutes and the State Statutes do not contemplate appeals on frivolous points, that such appeals are a waste of time.

I only have one or two more things to add. In view of the sentences that these men face, if they feel—and personally I believe there are one or two points that were simply omissions in this case, they simply are not in the record, the existence of the corporation, and the right shown to the possession of the money by the individuals involved. In my opinion those two omissions are very important, if not fatal in this case.

Another point raised by the defendants—I know they have raised the point of presumption of the innocence not being afforded to them; that the trial judge was prejudiced against them throughout the entire trial; that the trial judge should have dismissed the case as the defendants are not guilty as charged; that exhibits were entered over objections and should not have been allowed, and others.

Your Honor, I have not had a chance to inquire exactly what was meant in Point No. 12 here, as to the excluding of witnesses, that two witnesses did sit in the courtroom prior to testifying, but if there was such a situation I am sure that the prosecutor would agree that that would be of considerable importance and have a substantial bearing on this matter, if there was a witness sitting in the courtroom prior to testifying. I don't recall that there was one, and I haven't talked to the defendants
43 about that. I think I should do that now.

(Mr. Lynch consults with the defendants.)

The defendants contend, your Honor, that the witnesses from the motels were there. I didn't know them, and I don't know whether that was the situation or not, if both men from the motels were in the courtroom at the same time before one of them testified.

As I say, your Honor, I did not know them, and I don't know whether they did nor not, and I did not recognize them before or afterwards. It is conceivable, your Honor, that since we did invoke the exclusion of witnesses rule, that if that happened, it would be a matter that would have some substance to it, that as they sat there, certain things would have occurred to them.

Your Honor recalls that one of these men made an attempt to identify the defendant, but the other made no attempt to do so.

So, your Honor, it would appear from the motions of the defendants that the entire record, almost, would be necessary to review these things, if these contentions are all seriously made, and I am sure that some of them are.

The identification is challenged here, the identification of one of the defendants by Officer Rafferty, and of course he changed his mind on the witness stand, pointing to one man

and then to another. I don't know which way it was or which was correct, or how it was done, but there was some confusion in the identity certainly.

My contention, of course, your Honor, is that the admission of the guns was very prejudicial. The only person who could place that gun anywhere near the defendant was the
44 accomplice Jennings, who said that was the gun, but on cross examination he said it just looked like the gun, that that was as close as anybody could come, and that other than that he couldn't identify the gun. It was claimed then that the gun was recovered on another floor of the hotel, not where the defendants were registered or where they had a room. In any event, your Honor, the gun was introduced in evidence and I suppose that goes to the weight of the evidence here.

Then the jacket of Lorentzen, claimed to have some money in it. I don't know how they identified that as the same money taken from the second motel, which was claimed to be in the jacket. The jacket was never found in the possession of Mr. Lorentzen. In fact, it was found in the car which was recovered there, and apparently they didn't take it from the car until the following day. It was merely described, your Honor, as being like the jacket that Mr. Lorentzen was supposed to have worn on the night before, and that was likewise permitted to go in evidence.

I raised that point before, and your Honor's answer was that it was true that there was no testimony showing continuous possession, but that that would go to the weight of it and not to the admissibility.

Particularly with regard to the gun, your Honor, I think the admission of that was certainly prejudicial, unless it was shown by more positive testimony to have been the weapon used. Of course we have the testimony of this man Jennings that he didn't do any firing with the gun, that he just had a gun at the time that he struck one of the victims.

Now, as to this case of Woods versus Rhay, I think
45 it has been the tendency, as your Honor knows, to allow the review of such cases, more and more, because these fellows are faced with a long time in prison, and if there is any-

thing in the record which has been a denial of their rights, whether the Court did it or anybody else or whether it is something I have overlooked. I am sure that your Honor would think they are entitled to a review under that situation.

They have raised here many of the points that I raised on this list here [indicating], and particularly with reference to the testimony as to who owned the money, the existence of the corporation—there was no testimony as to the second one, they brought in an affidavit or an individual, this Travelodge fellow who worked there, and he couldn't prove the existence of anything. He didn't say he was an officer, he couldn't prove that there was such a corporation, it was just left up in the air, and if someone is going to get 20 years for that, for robbing that particular place, that particular corporation, I think it is a matter that certainly has some substance to it.

I think Mr. Draper would like to address the Court.

Mr. DRAPER. Your Honor, I am not a lawyer. I will have to have the entire record in order to enable me to prepare my appeal, and anything less than that would be denying me what I need to proceed upon, and the two men charged here with me would need the same thing. We have no funds with which to hire a lawyer to prepare an appeal, or to prosecute it, and without this record we have nothing to work from and nothing to work on.

I don't know what the law says. I must just look through all the record to find what I need, and I want all of it transcribed to start from.

I believe I have alleged what I think are sufficient grounds, stating my position. So far, I don't think anything has been done, because there are cases that I have found so far that back up every allegation I have made, perhaps not too well, but I am not a lawyer. I just have to read these things and interpret them as best I can from the books I have.

The COURT. What books do you have in the penitentiary?

Mr. DRAPER. A few of these Washington Reports, a law dictionary, something on federal law, just a smattering here and there.

The COURT. It is not a complete library.

Mr. DRAPER. Oh, no. Most of the law books go back to 1905, 1908, and there are a few of the modern ones, but very

few. Most of them have to do with the federal law and due process.

The COURT. Well, Mr. Draper, you have made some allegations here, 13 of them actually. The law has given you your day in court today. Regardless of what the ruling of this Court is today, you will have had your day in court. This is the time to tell the Court about the facts which you think support these general statements that you have here.

Mr. DRAPER. Well, I am not a lawyer, but I would like to refer the Court to the case of Woods versus Rhay. I don't know what error is, sir.

The COURT. Well, let's go through these points first, and then we can take up the law.

Mr. DRAPER. All right. My allegation No. 1 is that the testimony of the witnesses contradicted each other about the identification of the defendants. Three people sat in
47 the chair and offered contradictory evidence, but with the help of the Court one of them was straightened out. I contend that leaves contradictory evidence as to who was what.

No. 2, identifiction of clothes and weapons, in error, no continuity of possession shown, nor ownership established, nor was ownership of these articles by the defendants proven. They could be anybody's articles. There are rules that have been set up for the prosecution of criminal cases, and I know that the Courts have great discretion as to what things to admit and what things not to admit, but even so, the prosecuting attorney must show continuance of possession, he cannot just bring something in here and say it is something taken from us. They must prove it, and those things were not proven.

No. 3, testimony of many witnesses in direct conflict with each other, and at times contradict each other as to what happened, how it happened, and by whom it was done. That has the same basis as the Points 1 and 2. This whole thing was very poorly put together, very poorly presented.

No. 4, that one witness perjured himself repeatedly, and his testimony was not stricken or thrown out. There were objections made to it, but he perjured himself.

The COURT. Which one was that?

Mr. DRAPER. Jennings. This is from memory, and I don't know how many times he did the same thing.

No. 5, that the presumption of innocence was never afforded the defendants. Every time an objection was raised it was a matter of discretion with the Court, and the Court always ruled against me. I am entitled to be presumed innocent until proven guilty beyond reasonable doubt, every to the
48 Court, but that presumption was not granted to me.

No. 6, that the trial judge was prejudiced against the defendants throughout the entire trial. As far as No. 5 is concerned here, your Honor, from the very beginning you ruled against me on every point which was objected to or brought up.

No. 7, that the trial judge should have dismissed the case, as the defendants are not guilty as charged. The basis of the case was not upheld, it should have been dismissed and dropped.

No. 8, that exhibits were entered over objections that should not have been allowed to be entered. You can't just bring something into court and say, "This is so and so," and establish a fact that way, but that is what happened with half of the evidence that was used here.

No. 9, that testimony was allowed over objections that should not have been allowed. I think that speaks for itself. There is testimony which was objected to but which was allowed to stand, and in some cases you instructed the reporter to have it stricken from the record, and there was nothing in the instructions to contradict that, and any time you speak in court, that is an instruction, if it is not directed to the prosecutor or to defendant's counsel, the jury listens to it all.

The COURT. What did I say?

Mr. DRAPER. If you offer an opinion, or a thought or anything to show how you feel.

The COURT. What did I do?

Mr. DRAPER. I don't remember, because I don't have the transcript, but I remember a very great feeling at the
49 time of the trial over this.

No. 10, that the defendant was charged with two specific robberies of two specific companies, that in fact were never proven to have been robbed, that in fact you have to prove each portion of a crime, you don't just say that something happened.

and, in fact, there is nothing in the record to show that these places were ever robbed. It is a question of who was robbed what was done, who owned the property, if there was any property, and there was no evidence on that.

Now, there are many cases that state that the owner must have possession of the property involved. There is too much of that for me to go into now, but that was never done.

No. 11, that the defendant was forced to sit at the same table with the two prosecutors and a policeman that were subpoenaed as a witness. The policeman went through facial movements here during the trial, anything that was pointed out against me, he sat there and smiled, and that had an influence on the jury. Any time I made a point that was against them, the man just sat there and frowned. There was nothing impartial about that, and the jury is sitting right there and sees it.

The COURT. You refer to the witness on the stand?

Mr. DRAPER. It was Officer Simonsen. He didn't testify, but he put on quite a show there, and there is nothing I can do about that, because that is worse than testimony.

No. 12. That after an order excluding witnesses from the courtroom, the two main witnesses sat in the courtroom prior to testifying, which had a substantial bearing on their testimony. The two clerks were back there in the front pew. I think there were three of them. I can verify that, and they sat there and listened to the first three people testify, and then they testified. I don't remember the officer's name, but at that time Mr. Lynch asked the Court to exclude the witnesses, or see that they were ushered out, because we asked for the exclusion and the Court granted it. Then the two of them got up and left. I didn't know it at that time, but I should have inquired as to who it was.

The COURT. Just to get the record straight, your point is that they were in the courtroom until Mr. Lynch asked for the exclusion of witnesses?

Mr. DRAPER. No, he asked for it before the case was started, at the beginning, and these people sat here after the case was started, and listened to the testimony. In fact, it was the testimony of their employers, they were listening to what they had to say, and as far as I recall there were three witnesses

there, there may have been more. I didn't recognize them until they took the chair. I was pretty sure they had something to do with the case, because I saw them outside with the prosecutor, but it was after they took the chair that I was positive.

The COURT. Are you in position to present any evidence to the Court on that?

Mr. DRAPER. You can't expect me to tell you when I have no way—a substantial part of my rights are being denied me.

The COURT. The transcript wouldn't show that, of course.

Mr. DRAPER. A transcript would show when somebody leaves the court, and it would be only fair to assume it was someone who had something to do with the case. This came as a

31 surprise to me.

The COURT. This has been a matter of concern to you for some time, apparently, so what was the surprise about it?

Mr. DRAPER. I had no confirmation about this until five days ago.

The COURT. Five days ago?

Mr. DRAPER. Yes.

The COURT. You have affidavits of some one that some other people were in the courtroom, these witnesses, who were not supposed to be?

Mr. DRAPER. Yes, that is right.

The COURT. Where are they?

Mr. DRAPER. I have talked to them. I didn't know that an affidavit was proper, so I didn't get one.

The COURT. Who are they?

Mr. DRAPER. I don't have to answer that, and I am not going to answer that.

(Mr. Draper confers with Mr. Lynch.)

Mr. DRAPER. I base this on the case of Woods v. Rhay, 338 Pacific Reporter (2nd) and other similar cases.

I may be wrong, but I feel aggrieved and I offer in good faith what I believe are points for the basis of an appeal. I am also indigent and I intend to prosecute this in forma pauperis and in per se. It is necessary to my needs, to guarantee my constitutional rights and due process, to obtain the record I need.

Under No. 13 of my points here I say that without the statement of facts I am unable to prosecute my appeal because I don't know what is there. I don't know what the law says is necessary or pertinent here. I have to have the record
52 to start looking into it. I feel aggrieved, very definitely.

I don't think I was properly sentenced to two consecutive terms, if these cases were properly tried.

I need the record to substantiate my allegations and without it I have nothing to work from.

Mr. Lynch is just here, as you have told me, arguing this for a free transcript, but he wasn't available to me.

The COURT. Yes, he is.

Mr. DRAPER. I don't wish to have Mr. Lynch, and I am not required to have him.

The COURT. He is available anyway.

Mr. DRAPER. Thank you.

I will have to have the transcript to work from because the memory alone is not sufficient, and Mr. Lynch's isn't either and it is not available to me.

Let's just face the facts, that I will be in the penitentiary a long ways away from here, and an attorney here only gets things in his office, he can't run down there and check things with me. At least he doesn't, but my attorney is my agent, he is supposed to listen to what I have to say and do as I want him to do, and with just a court appointment he is not going to devote much time to me, but if I can use my own time sitting down there I can look over this, I can use my own time in the preparation of my appeal, and it would greatly help me in connection with what I say here, and it would therefore serve justice.

I don't expect any reasonable attorney to get excited over a court appointment. I can't expect him to be going up and down
53 here and there around the country to do something for someone or help someone who has been convicted of two major crimes regardless of the court appointment. They have their own beliefs. Nobody wants to spend money when they aren't going to get it back.

The COURT. The fact that Mr. Lynch is appointed to see that the proper procedure is followed, that your rights are protected—that is not going to prevent you from assisting you in any way that you wish.

Mr. DRAPER. Is it my—Do I understand that the Court has appointed Mr. Lynch to aid and help me in the preparation of my appeal from the two convictions?

The COURT. In any proceedings that may follow this hearing.

Mr. DRAPER. In any subsequent proceeding?

The COURT. Yes, to the Supreme Court of the State of Washington.

Mr. DRAPER. Well, I don't know what I have to do, but let the record show an objection because if I have any legal grounds or rights I want to protect them, I don't want them to be neglected.

And as I said before we started, I don't know what those rights are, but I don't want to waive anything by not saying so.

With Mr. Lynch here, since you are forcing me to accept him, that he can look out for my legal rights, but even so I wish to offer a blanket objection, so that I don't lose any rights that I have.

The COURT. Anything I did or didn't do you would object to, so I assume you are objecting now.

Mr. DRAPER. Would you read that?

(Record read.)

54 Mr. DRAPER. I don't know what a lot of these words mean. One dictionary, the standard dictionary says one thing, and the law dictionary says something else.

I have nothing else to say. I have referred to cases here. I have numerous other ones that are pertinent if I can make them stand up. I think this is definitely important to justice. I feel that I have sat here and gone through a farce. I feel that the case was not presented in the proper manner, it has been done with a great disregard to what is necessary to be shown to support a valid conviction.

On that I will rest.

The COURT. Is that all, Mr. Lynch?

Mr. LYNCH. I don't have anything further.

The COURT. As to the motions on behalf of all the defendants?

Mr. LYNCH. No, your Honor.

The COURT. Mr. Johnson.

Mr. JOHNSON. I think we are in agreement, in that the case of Woods versus Rhay furnishes us the nearest and best guide we can find as to procedure in a hearing of this sort, particularly on Page 44 of that case, the trial court is given certain procedures—not only the trial court but counsel and the indigent defendant at well.

It occurs to me first, from reading at Page 44, that the supreme court would like to have from the defendants themselves, an allegation with some particularity, as to how they claim error.

I might observe that as I listened to the statement of Mr. Draper as to his thirteen claims of error, it seemed to me that so many of these items of claimed error——

55 The COURT. Excuse me, Mr. Johnson. May I see your counter-affidavit? It is in the file?

Mr. JOHNSON. It should be, your Honor, it was filed.

The COURT. Here it is.

Mr. JOHNSON. I have a copy of it, and I gave a copy of it to Mr. Lynch.

There are so many of these claims of error in behalf of each defendant, and they relate not to the admissibility of the evidence at all, but, in effect, are matters which relate more to the weight of the evidence, as Mr. Lynch has mentioned here himself in his comments.

For example, I recall no contradiction in testimony. As I recall the testimony of the witnesses in this case, there was no material contradiction in their identification of the defendants, and a claim made here that a witness perjured himself repeatedly is just the bare assertion. That is a question for the jury. It has no support here whatever, other than Mr. Draper's statement.

The presumption of innocence was certainly afforded the defendants during the trial and in the instructions by the Court to the jury. These points made by Mr. Draper are very nebulous, your Honor, and many of them are incapable of a pre-

cise answer for that reason, except that I know that his assignment of error No. 11, the claim that the defendant was forced to sit at the same table with the two prosecutors and a policeman who was subpoenaed as a witness, I think we are all aware and probably the record should reflect that in this county your counsel tables are just the one long table where all the parties sit, police officers, prosecuting attorneys, defendants and their counsel, they all sit at the same table.

56 Counsel and the police officers frequently have to get up and sit down, go back and forth, and it is something that the record doesn't reflect because it wasn't mentioned in the trial, or at least it was never brought to my attention.

The same thing applies to the allegation that two witnesses sat in the courtroom prior to testifying. There was no such claim made at the time of the trial. I have asked the other participants in the trial if that took place and they do not recall it. It was never brought to the attention of anybody, and I don't think it happened, but assuming that they were in the courtroom, there has been no showing here as to what prejudice resulted to these defendants if it did happen.

I think the record will reflect that at the time I started to make my opening statement to the jury, after the jury was sworn, Mr. Lynch interrupted at that time and moved for the exclusion of witnesses. It is my recollection that there were one or two witnesses in the courtroom. Who they were I don't recall now, but they left the courtroom. There was no complaint raised by anyone, nothing was brought to the attention of the Court or myself, that any witnesses remained in the courtroom.

Now, your Honor, the claims of error mentioned in Points 10 and 12 have already been pointed out by Mr. Lynch in his motion for new trial, and in substance they are the same arguments had at that time. I don't think any extended review of the evidence is necessary at this time except to point out that, in my view, each of the witnesses who participated in this trial, the witnesses from the motels, testified to every material allegation that was present in the information.

All Mr. Draper and the other defendants here are alleging is that the jury didn't have to believe those witnesses. Per-

haps that is true, but it is also true, your Honor, that if what those witnesses testified to was not correct, it could have been impeached or contradicted by the testimony of the witnesses for the defendants, but as your Honor knows, there were no witnesses for the defendant, no testimony whatsoever on the defendants' side of this.

The same allegation is made here concerning the ownership of the property. They mean "ownership" in its legal sense, as distinguished from possession. That also applies to the gun and the clothing.

From my knowledge ownership by the defendants of this gun is not necessarily essential in this case. It doesn't make it any less a robbery when the other facts are present.

Mr. Lynch spoke of the testimony regarding this gun, and the Court will recall the testimony of Mr. Jennings that a woman acquaintance of the defendant Draper took one of the guns used in the robbery, took it out of the room, and the further testimony that the gun, of similar appearance and size, shape, et cetera, was found a few hours later, or on the next morning. This occurred at about two or three in the morning. The accomplice Jennings identified this gun not by serial number or by having his initials in it, because that is not done in most cases. I think Court and counsel are aware of that situation.

This is a matter that goes to the weight of the testimony and not to its admissibility. In short, your Honor, my view of these errors is that they don't allege in any particular, any material or substantial error in this case. In fact, my impression of the arguments on behalf of Mr. Draper—

58 conceding again that he is not a lawyer—is that he doesn't know what is in the record and he would like a free transcript so he can see if there is anything in support of these claims of error.

On behalf of the State we resist the motion for free transcript on the basis that there is nothing here to support any substantial claim of error whatsoever.

The COURT. Mr. Lynch takes the position that whenever a defendant states that the evidence is not sufficient to support a conviction, that the defendant is then entitled to a free tran-

script or statement of facts, as a matter of constitutional right. I am sure there is no authority for that statement.

An indigent defendant does not have an absolute right to a free transcript at county expense. Our supreme court held in the Grady case, in Grady case, in 51 Wash. (Holt) that an indigent defendant does not have a right to a free transcript at county expense where it appears that his appeal is patently frivolous.

So, at this time it is for the Court to determine whether or not there is any merit to the claims of error which have been made here. I am left somewhat in the dark as to what specifically, the defendants are objecting to, except that I am sure from what has been said by Mr. Draper, that he wants to appeal this case because of the fact that the sentences imposed were to run consecutively.

I don't understand the reasoning of these three defendants that they should get concurrent sentences, when the man Jennings pled guilty and was given consecutive sentences by another judge.

But, be that as it may, going through the 13 listed objections I might make this general observation that I think the defendants have failed to see the forest by reason of the trees. They are picking at things in the state's case that may be true, inconsistencies or inaccuracies in identification, but that does not mean that the over all picture does not clearly and convincingly identify the three or four defendants and the mere fact that the victims are not able to say, "That is the man who hit me," does not mean that there is no sufficient evidence, and that the defendants can go free because the victims are knocked unconscious before identifying the defendants. It is the over all picture that we have to look at.

So many of these objections go to the weight of the evidence which was something for the jury to determine, certainly it is not for the Court to determine. That applies to their first objection here, that there was a contradiction among the witnesses as to the identification of the defendants. I don't think "contradiction" would be the proper word, because the victims did not positively identify the defendants. There was nothing in their identification which excluded them. It took some other

evidence to identify the defendants, the general circumstances, which I will get to in a minute.

The same thing applies to their second point here, the weapons and the clothes and who had possession of them. That is circumstantial evidence, and it has to be viewed in the light of all the testimony.

Now, the defendants complaint here is that Jennings, who came into court here as an accomplice, and whose testimony had to be considered very cautiously—and the jury was instructed to consider it very cautiously—the defendants contend here that his testimony was perjury. That was for the jury to decide. The jury had an opportunity to evaluate the testimony of Jennings, to look at it.

However, the jury is not given a similar right with respect to the defendants' testimony because they did not testify.

As to the contention that they were not given the presumption of innocense, after this case was in, after it was in the hands of the jury, after the jury had been instructed that the defendants were presumed to be innocent, Mr. Lynch in his argument to the jury emphasized that, and as a matter of fact before the case was started Mr. Lynch emphasized that in his questioning of prospective jurors, as is usual in a criminal case. From the beginning of the case to the end of the case the jury was made aware of the presumption of innocence as to all the defendants.

There is the general allegation here that the judge was prejudiced, but I have not been supplied with any facts indicating whether I was or not. If anything was done which might indicate prejudice on the part of the Court, or which would influence the jury, I would like to know about that. I haven't been supplied with any such information.

As to Number 7 here, that the case should have been dismissed, that is just repeating the arguments made by Mr. Lynch at the close of the defendant's case, when he challenged the sufficiency of the evidence.

As to Number 8, exhibits being entered over objections, they usually are received over the objections of the defendant. It is only a question of whether they were improperly admitted.

61 I am sure that Mr. Lynch, at the close of this case presented everything that should have been presented and that could have been presented by any competent counsel.

Now, the fact that the defendants were charged with robbing two companies which were never proved to be robbed, that is a very general allegation, and it strikes the mind of anyone who heard this case as being quite unusual, because if there was anything that was very definitely established, it was that these two places had been robbed. Whether the defendants were identified as those who robbed the places is a question for the jury when presented to them under competent evidence.

The complaint that the defendants were forced to sit at the same table with two prosecuting attorneys and a policeman, of course, in and of itself, is not of any particular consequence. The prosecutors have to be there to present their case, there has to be an officer there, and I see no prejudice because of the fact that he was there.

Now, with reference to the fact that the two socalled victims were in court during the testimony is something that is not before the court properly now because I don't know and nobody else seems to know. If there are affidavits from people who say they know, those should be presented to me, but based upon what has been presented to me, and my recollection, what I observed, my recollection is that Mr. Johnson started to make is opening statement when he was interrupted by Mr. Lynch, and Mr. Lynch requested the rule of exclusion of witnesses be invoked, and it was invoked, and some of those in the courtroom did leave. Thereafter the bailiff was instructed to ask everybody who entered the courtroom if they are a witness, and if that was not done, I would like to know about it.

62 However, assume that it wasn't done, assume that two of the witnesses were present in court, there would have to be some showing of prejudice to the rights of the defendants because that was the situation.

Now, looking at the over all picture of the case, I don't presume to recall what all the testimony was, in its entirety, but as to what is presented here, I think the place to begin is with the testimony of Mrs. Albert Allen, who is the mother of Jennings, who testified specifically with reference to the prepara-

tion which was made for this robbery, and the defendants who were there making those preparations with her son Jennings. That is a part of the continuity of the case, showing that preparation, and the fact that the defendants were together, and, of course, to get the overall picture we also have the testimony of Jennings himself, the accomplice. His testimony, of course, has to be looked upon with extreme caution, and the jury was so instructed, but if his testimony is corroborated by the other testimony, it can be considered, and it has to be considered in this case, because all the testimony presented in this case was uncontroverted. None of defendants took the stand and controverted any of the testimony.

It is too late for Mr. Draper to say that Mr. Jennings committed perjury, because Mr. Jennings testified here, as all the defendants could have testified here. The defendants had a right to take the stand and explain to the jury in what respect Mr. Jennings was perjuring himself. Therefore, the jury had every right to accept the testimony of the man who claimed that he participated in this thing, and who identified all four of you.

63 That is enough to convict [illegible] have the witnessing of the robberies, also of the police officers themselves. They appeared on the scene almost immediately. Don Rafferty practically observed the holdup of the Downtowner, and he kept the car used in the holdup in constant pursuit, and he was joined later on by Robert Bailor, another police officer.

I think that is where this planned robbery failed, and I think there is considerable resentment on the part of the defendants because their plans failed when they happened to [illegible] to two police officers who were more devoted to duty than most criminals think police officers are, and the police officers had the intelligence and the courage to go with it.

They broke up ... [illegible] ... in the process. I won't review the ... testimony of the hall maid at the Davenport Hotel, and the chief clerk at the Davenport Hotel, and the airline employee who sold the tickets, and the police ... who found the ticket on Draper. ... circumstances of the case, and the evidence was ... [illegible]

I am of the opinion that the petition for a free transcript to appeal this matter is untimely [illegible] and the motion will be denied.

However, that does not prevent the Supreme Court from reviewing this matter, because this Court is making findings of fact, which will set forth the substance of the testimony that supports the necessary allegations and proof of [illegible] and that can be presented to the Supreme Court for review, which is a procedure available to you, and if the Su-

64 preme Court says there is a question for ... justifies Spokane County paying the expense of the appeal by making available to you a full transcript, that will be done.

Findings may be presented in accordance with comments which have been made, after presentation to Mr. [illegible]

Court is adjourned.

65 [Reporter's certificate to foregoing transcript omitted in printing.]

66 [Judge's certificate to foregoing transcript omitted in printing.]

66a In the Supreme Court of the State of Washington

No. 35914

THE STATE OF WASHINGTON, PLAINTIFF

v.

JAMES DANIEL LONG, RAYMOND LEE LORENTZEN, AND ROBERT A. DRAPER, DEFENDANTS AND RELATORS

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY, HUGH J. EVANS, JUDGE, RESPONDENT

Docket entries

Appearance Docket, Page 558

1961

Feb. 8.....	Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis.
Feb 14.....	Order for Writ of Certiorari to Issue.
Feb. 14.....	Writ of Certiorari to Issue.
March 3.....	Transcript.
March 3.....	Hearing, etc. (Part of Record).
March 6.....	Petition for Writ of Habeas Corpus.
March 6.....	(Sugg.) Order of Habeas Corpus.
March 6.....	Brief in Support of Motion of Certiorari.
May 9.....	Petitioner's Brief on Motion.
May 11.....	Brief of Respondent.
July 28.....	Motion for Rehearing and Hearing En Banc.
Sept. 15.....	Letter to Chief Justice from Robert A. Draper.
Sept. 28.....	Opinion.—Writ Quashed—Dept. I.
Nov. 3.....	Judgment.

1962

June 29.....	Certified Copy of Order from U.S. Supreme Court granting certiorari.
Aug. 31.....	Order directing Clerk to Transmit Entire Original File to U.S. Supreme Court.

67 In the Supreme Court of the State of Washington

Cause No. 35914

ROBERT DRAPER, JAMES LONG, AND RAYMOND LORENTZEN,
PETITIONERS

v.

STATE OF WASHINGTON, JUDGE HUGH EVANS, SPOKANE COUNTY SUPERIOR COURT, RESPONDENTS

Petition for a writ of certiorari in forma pauperis

Filed February 8, 1961

AFFIDAVIT

STATE OF WASHINGTON,
County of Walla Walla, ss:

To the Honorable Judges of the Supreme Court of the State of Washington:

[File endorsement omitted.]

Comes no before this Court Robert Draper, James Long, and Raymond Lorentzen, the above named petitioners, who respectfully prays that a writ of Certiorari issues from this Court to the Superior Court of Spokane County to review the decision rendered therein on a motion for a free transcript on November 28, 1960, Cause No. 16603.

Petitioners further state that they are in the custody of B. J. Rhay, Superintendant, Washington State Penitentiary, are indigents, so recognized by the Spokane County Court, are over 21 years of age, are competent witnesses, are Citizens of the United States by birth and the State of Washington by residence, that they are illegally deprived of their liberty. That they are aperating Pro Se and Per Se.

JURISDICTION

Is Found in RCW. 7.16.040 "or one acting illegally, or, to correct any erroreous or void proceeding * * * any plain, speedy and adequate remedy as law"

Also RCW. 2.08.010 "* * * said Courts and their judges shall have power to issue writs of Mandamus, quo warrants, review, certiorari, prohabition and writs of habaes corpus on petition by or on behalf of any persons in actual custody * * *"

68 Also found in the Washington State Constitution: Article I. Section 22 Rights of Accused Persons: "In criminal prosecutions, the accused shall *have the right to appear and defend in person*, and by counsel, to demand the nature and cause of the accusation against him, *to have a copy thereof*, to testify in his own behalf to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy trial by an impartial Jury of the County in which the offence is alleged to have been committeed, and the *right to appeal in all cases;* and, in no instance, shall the accused person before *final Judgment* be *compelled to advance money of fees to secure the rights herein* guaranteed."

QUESTION PRESENTED

The question at bar is whether petitioners are entitled to an appeal. Without a full transcript petitioners will be unable to prosecute an appeal. The right to appeal is guaranteed to all in the State of Washington by the 10th amendment to the Washington State Constitution.

RCW. 7.16.170 states: "The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested."

Robert Draper.
ROBERT DRAPER.
James Long.
JAMES LONG.
Raymond Lorentzen.
RAYMOND LORENTZEN.

Subscribed and sworn to before me this 22d day of January, 1951.

F. J. FINK.
Notary Public in and for the State of Washington, Residing in the County of Walla Walla.

69 [Affidavit of service by mailing omitted in printing.]

70 In the Supreme Court of the State of Washington

Cause No. ——

IN THE MATTER OF THE APPLICATION FOR A WRIT OF CERTIORARI IN FORMA PAUPERIS

ROBERT DRAPER, JAMES LONG, AND RAYMOND LORENTZEN, PETITIONERS

v.

STATE OF WASHINGTON AND HUGH EVANS JUDGE SPOKANE COUNTY SUPERIOR COURT, RESPONDENT

Motion for an order granting leave to proceed in forma pauperis

Comes now Robert Draper, James Long, and Raymond Lorentzen, the above named petitioners, and respectfully moves the Court for an order granting them leave to file their petition for a writ of Certiorari in forma pauperis. This motion is based on the sub-joined affidavit which follows and the provisions of (RCW 4.32.070 Rem. Rev. Statutes 60.04 and rules of court, rule 41 and 43)

Respectfully submitted.

Robert Draper.
ROBERT DRAPER.
James Long.
JAMES LONG.
Raymond Lorentzen.
RAYMOND LORENTZEN.

To the Clerk:

The petition to proceed in forma pauperis is granted.

Done Feb. 8, 1962.

ROBERT C. FINLEY,
Chief Justice.

AFFIDAVIT

STATE OF WASHINGTON,
County of Walla Walla, ss:

Robert Draper, James Long, and Raymond Lorentzen, being first duly sworn, upon their oath deposes and says: That they

are the affiants herein and the Petitioners above named, and that the instant proceedings are brought in good faith upon the sincere belief that their cause is meritorious; that affiants are without funds and therefore unable to pay the filing fees or give security for the cost here; that affiants are citizens of the United States by nativity and of the State of Washington by residence, of legal age and competent to be a witness; that this cause may be prosecuted only if affiants are permitted to proceed in forma pauperis, that affiants humbly pray for this Court's permission to so proceed.

71 Respectfully submitted.

Robert Draper.
ROBERT DRAPER.
James Long.
JAMES LONG.
Raymond Lorentzen.
RAYMOND LORENTZEN.

Subscribed and sworn to before me this 22d day of January, 1961.

[SEAL] F. J. FINK.
Notary Public in and for the State of Washington, Residing in the County of Walla Walla.

72 In the Supreme Court of the State of Washington

No. 35914

ROBERT DRAPER, JAMES LONG, AND RAYMOND LORENTZEN, PETITIONERS

v.

STATE OF WASHINGTON, JUDGE HUGH EVANS, SPOKANE COUNTY SUPERIOR COURT, RESPONDENT

Order for writ of certiorari to issue

February 13, 1961

[File endorsement omitted.]

It appearing, upon the petition and affidavits of James D. Long, Raymond L. Lorentzen, and Robert Draper for a Writ of Certiorari to be issued by this Court for a review of the

order of the Honorable Hugh H. Evans, Judge of the Superior Court for Spokane County, entered on or about November 28, 1960 in Cause Number 16603 of that Court, denying the motion of said petitioners for the preparation, without cost to said petitioners, of Statement of Facts and Transcript of all proceedings had by said Judge or in this Court in the cause entitled State of Washington v. James D. Long, Raymond L. Lorentzen, and Robert Draper, No. 16603, of said Superior Court; it appears that said Judge in denying said motion may have abused his discretion by denying said petitioners an adequate record for appeal;

It further appearing that the Writ of Certiorari prayed for should issue,

It is therefore ordered that a Writ of Certiorari be issued setting a time for the hearing of the review of the Order of the Honorable Hugh H. Evans, entered on or about November 28, 1960, in said cause, and directing the Honorable Hugh H. Evans, Judge of the Superior Court for Spokane County, to certify and return to this Court in the City of Olympia, Thurston County, State of Washington, on the 10th day of
73 March, 1961, a stenographic report of the hearing conducted on or about November 28, 1960, in said Court and a Transcript of all the proceedings relative to said petitioners' motion for a Statement of Facts, these to be prepared in accordance with the rules announced in In re Woods v. Rhay (1959), 54 Wn. (2d) 36.

Done at Olympia, Washington, this 13th day of Feb. 1961.

ROBERT C. FINLEY,
Chief Justice.

74 In the Supreme Court of the State of Washington

No. 35914

ROBERT DRAPER, JAMES LONG, AND RAYMOND LORENTZEN, PETITIONERS

v.

STATE OF WASHINGTON, JUDGE HUGH EVANS, SPOKANE COUNTY SUPERIOR COURT, RESPONDENTS

Writ of certiorari to review order of the Superior Court

February 14, 1961

[File endorsement omitted.]

The State of Washington to the Honorable Hugh H. Evans, Judge of the Superior Court of the State of Washington for Spokane County, and to the Prosecuting Attorney of said County:

Whereas, it appears by the petition of James D. Long, Raymond L. Lorentzen, and Robert Draper that in Cause Number 16603 in the Superior Court of the State of Washington for Spokane County, entitled State of Washington v. James D. Long, Raymond L. Lorentzen, and Robert Draper, the Superior Court Judge of said Court in denying the defendants a free transcript and statement of facts taken from the Court Reporter's notes of the trial may have abused his discretion in denying to petitioners an effective right to appeal;

It further appearing that there is no appeal nor, in the judgment of the Court, speedy and adequate remedy for petitioners from said Order;

It is therefore ordered and commanded that the Honorable Hugh H. Evans certify and send to the Supreme Court of the State of Washington at the Temple of Justice in the City of Olympia, Thurston County, State of Washington, on or before the 10th day of March, 1961, the stenographic report of the hearing held on or about November 28, 1960, before said Judge relative to petitioners' motion in Forma

75 Pauperis for a statement of facts and a transcript, this to include a transcript of all proceedings therein including oral arguments of counsel, that the same may be reviewed

by the Supreme Court of the State of Washington and that the Supreme Court may further cause to be done thereupon what it may appear ought to be done or, in the alternative, to show cause why the Honorable Hugh H. Evans should not be required to do so.

Witness the Honorable Robert C. Finley, Chief Justice of the Supreme Court of the State of Washington, and the seal of the said Court hereto affixed this 14th day of February, 1961.

[SEAL]

ROBERT HOLSTEIN,
Clerk, Supreme Court.

76 In the Supreme Court of the State of Washington, Olympia, Washington

Cause No. 35914

ROBERT DRAPER, JAMES LONG, AND RAYMOND LORENZEN, PETITIONERS

v.

STATE OF WASHINGTON AND HUGH H. EVANS, JUDGE, SPOKANE COUNTY SUPERIOR COURT, RESPONDANTS

Petition for a writ of habeas corpus ad testificandum

Filed March 6, 1961

Before the Honorable Robert C. Finley, Chief Justice Supreme Court of the State of Washington

[File endorsement omitted.]

Now appears Robert Draper, James Long, Raymond Lorenzen, Petitioners in Cause No. 35914, now pending before the Court and scheduled for hearing on March 10, 1961, and petitions the Court for a writ of habeas corpus ad testificandum in order that he may appear to prosecute and defend there cause as contemplated by the applicable statutes contained in Chapter 7.36 of the Revised Code of Washington.

JURISDICTION

Jurisdiction of the Court to entertain and grant this petition is found in RCW 7.16.110 (the court must hear the parties

80 [Affidavit of service by mailing omitted in printing.]

81 Residence Phone KE 4-3244.

THOMAS F. LYNCH, ATTORNEY AT LAW
1103 PAULSEN BLDG., MA 4-2458,
Spokane 1, Washington, March 3, 1961.

Re: No. 35914.
Honorable HARRY ELLSWORTH FOSTER,
Assistant Chief Justice,
Washington Supreme Court,
Temple of Justice Building,
Olympia, Washington.

DEAR JUSTICE FOSTER: I am writing this letter pursuant to our telephone conversation of this date concerning the date set for hearing the applications for certiorari in the above case. As I stated, I have not received copies of the applications and did not learn of their existence until yesterday. It is not possible for me to submit a brief in time to comply with the rule.

I am a defendant in a civil matter which is set for trial here in Superior Court March 8, 1961. This case will probably last two or three days. Under the circumstances, I am respectfully requesting the court to strike the above matter and re-set the same for the next term of court. I have discussed this with the Prosecutors office here and they will not oppose a later setting.

Thank you for your courtesy.

Yours sincerely,

Thomas F. Lynch.
THOMAS F. LYNCH.

TFL:hl

MARCH 4, 1961.

This writ is continued until next motion day after March 10th 1961.

HARRY ELLSWORTH FOSTER,
Acting C.J.

82 ROBERT HOLSTEIN, *Clerk.*
ARCHIE B. STEWART, *Deputy Clerk.*

THE SUPREME COURT,
State of Washington, Olympia, March 6, 1961.

Re: No. 35914; Robert Draper, James Long and Raymond Lorentzen, Petitioners, v. State of Washington, Judge Hugh Evans, Spokane County Superior Court, Respondent.

Mr. THOMAS F. LYNCH,
1103 Paulsen Building,
Spokane 1, Washington.

Mr. ROBERT DRAPER, WSP #28228,
Mr. JAMES LONG, WSP #28230.
Mr. RAYMOND LORENTZEN, WSP #28231.
P.O. Box 520,
Walla Walla, Washington.

Mr. JOHN J. LALLY,
Prosecuting Attorney,
Spokane County,
Spokane, Washington.

GENTLEMEN: At the request of Mr. Thomas F. Lynch, Judge Harry Ellsworth Foster, the Acting Chief Justice, has continued the above writ until the next motion day after March 10, 1961.

The next motion day after March 10th will be shortly after the commencement of the new term of court on May 9th. You will be notified of the exact date.

Very truly yours,

ROBERT HOLSTEIN,
Clerk.

By ARCHIE B. STEWART,
Deputy.

ABS:fh.

Copy to: Mr. B. J. Rhay, Superintendent, Washington State Penitentiary, P.O. Box 520, Walla Walla, Washington.

4. Petitioners further state that this motion was submitted to the mail room supervisor of the Washington State Penitentiary at Walla Walla, Washington to be served by mailing, with first class postage affixed, to the following:

Original and five carbon copies to: Clerk of the Supreme Court, Temple of Justice, Olympia, Washington.

Two carbon copy to: Attorney General, Temple of Justice, Olympia, Washington.

One carbon copy to: Prosecuting Attorney, Spokane County Court House, Spokane, Washington.

and return One notarized copy to petitioners file, and that there is regular first class mail service between these points.

Respectfully submitted,

Robert Draper.
ROBERT DRAPER,
Petitioner, Movant.

Subscribed and sworn to before me this 25th day of July, 1961.

[SEAL] CARL L. VELEY,
Notary Public in and for the State of Washington, residing in Walla Walla County.

89 In reply refer to No. 2828.

P.O. Box 520,
WALLA WALLA, WASHINGTON,
August 7, 1961.

Re: 35914
Mr. TIMOTHY CLIFFORD,
Supreme Court, Temple of Justice, Olympia, Washington.

DEAR SIR: Thank you for your informative letter of August 1, 1961.

Being only a layman, a reasonable answer is greatly appreciated in these legal matters.

I would like to know if my petition for a writ of habeas corpus ad testificandum, and my letter of limitation of powers concerning the court appointed attorney were filed in this cause.

I presented some motions in this matter and have never received any communications in regards to them. If any information is possible it would be appreciated.

I wish to take this opportunity to thank you for anything that you might be able to tell me. Thank you.

Respectfully yours.

Robert Draper.
ROBERT DRAPER.

89a =35914

S 22 61.

Mr. CLIFFORD: This was on your desk. I placed it in file and took file.

ROSELLINI, J.

By jd.

90 In reply refer to No. 28228.

P.O. Box 520,
WALLA WALLA, WASHINGTON.
August 28, 1961.

Re: Cause 35914.

HONORABLE ROBERT C. FINLEY,
Chief Justice, Washington State Supreme Court,
Temple of Justice,
Olympia, Washington.

DEAR SIR: I realize that it is below the dignity of the Court to withhold a ruling upon a motion.

Therefore I will respectfully call to your attention for consideration a motion I submitted to this Court.

Since I was forced to point out to the clerk of this Court to get it filed that it was both timely and proper, I will now ask this august Court to note it for early determination.

The motion that I speak of is a petition for a re-hearing en banc in Cause No. 35914, submitted under Rules 7 and 15. Rules peculiar to the Supreme Court and R.C.W. 2.04.150 and 2.04.160.

91 Your early ruling upon this motion will be appreciated.

Thank you.

Very truly yours.

Robert Draper.
ROBERT DRAPER.

RCW 7.16.120 (subsection 3, affecting the rights of the parties); RCW 7.16.190 (The case must be heard by the Court); 7.16.240 (answer, under oath, made in the same manner as an answer to a complaint in a civil action); RCW 7.16.210 (If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, * * * the Court may * * * order the question to be tried);

also: Article 1, section 22 — "In criminal prosecutions, the accused shall have the right to appear and defend in person * * *. To testify in his own behalf * * * the right to appeal in all cases;

77. also: in RCW 2.08.010—"said courts and their judges * * * shall have power to issue writs * * * of certiorari * * * on behalf of any person in actual custody * * *"; also in RCW 7.36.140 (Duty of Court When Federal Question Is Raised: In the consideration of any petition for a writ * * * if any federal question shall be presented by the pleadings, it shall be the duty of the supreme court to determine in its opinion whether or not the petitioner has been denied a right guaranteed by the constitution of the United States.) also RCW 7.36.240 (* * * no writ * * * shall be disregarded for any defect therein * * *"); also in RCW 2.28.040 ("Every judicial officer has power (3) to compel the attendance of persons to testify in a proceeding pending before him * * *"); also in RCW 2.28.150 "* * * if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

ARGUMENT

It is conceded that upon the policy expressed in rule 5 of the Rules on appeal that "personal appearance of any party is not necessary," the Supreme Court has not made a practice of permitting individuals into the Court to appear on their own behalf. Since rule 5 is a court rule and not law, nor is it supported by any laws, and since it is in direct conflict with the statutes that I have brought forth, it is therefore inoperative in the case at bar. Petitioners have a constitutional right

to "Defend and be Heard". Attention of the court is respectfully directed to the fact that rule 5 relates only to those cases "on appeal".

Since the issue at bar is a "special proceeding" it would (also) appear that this rule does not properly apply here according to the rules too. In view of the fact that the applicable
78 statutes provide for a "hearing" rather than an ex parte proceeding, it naturally follows that both parties must be present to be heard.

The Office of the State Attorney General will undoubtedly appear to argue vigorously in support of their theory.

Respectfully submitted.

ROBERT DRAPER.
Per Se-Pro Se.

JAMES LONG.
Per Se-Pro Se.

RAYMOND LORENTZEN.
Per Se-Pro Se.

Subscribed and sworn to before me 1st day of March, 1961.

[SEAL] F. J. FINK.
Notary Public in and for the State of Washington, residing in the County of Walla Walla.

79 In the Supreme Court of the State of Washington
Olympia, Washington

Cause No. 35914

ROBERT DRAPER, JAMES LONG, AND RAYMOND LORENTZEN,
PETITIONERS

v.

STATE OF WASHINGTON AND HUGH H. EVENS, JUDGE SPOKANE COUNTY SUPERIOR COURT, RESPONDENTS

Suggested order of habeas corpus ad testificandum

Filed March 6, 1961

To: B. J. Rhay, Superintendent of the Washington State Penitentiary, at Walla Walla, Washington:

[File endorsement omitted.]

Know You by These Presents:

Robert Draper, James Long, and Raymond Lorentzen, petitioners in cause No. 35914 your inmates, numbers 28228, 28230, 28231 has applied to this Court for a writ of mandate to compel you to produce them in this Court at ——— a.m./p.m. on March 10, 1961, in the Temple of Justice at Olympia, Washington.

The Court being fully advised in the premise; and it appearing that the said Robert Draper, James Long, Raymond Lorentzen, is presenting their case pro se and is not represented by an attorney of record; and since RCW 7.16.190 gives to Robert Draper, James Long, Raymond Lorentzen the right "to be heard by the Court" and RCW 7.16.250 imposes upon this Court the duty of "hearing the argument of the case;"

It is hereby ordered and decreed That the said Robert Draper, James Long, Raymond Lorentzen be produced in this Court at the time and on the day specified above in order that he may be heard.

Signed: This ——— day of ———, 1961.

ROBERT C. FINLEY,
Chief Justice,
Supreme Court of the State of Washington.

83 In the Supreme Court of the State of Washington at Olympia, Washington

Cause No. 35914

ACTING CHIEF JUSTICE, FOSTER, WASHINGTON STATE SUPREME COURT, TEMPLE OF JUSTICE, OLYMPIA, WASHINGTON

ROBERT DRAPER, JAMES LONG, AND RAYMOND LORENTZEN PETITIONERS

v.

STATE OF WASHINGTON, AND HUGH H. EVENS, JUDGE SUPERIOR COURT, SPOKANE COUNTY, RESPONDENTS

Request for Order denying continuance

DEAR SIR: This is in reference to your letter, of March, 1961,

STATE OF WASHINGTON

AFFIDAVIT

County of Walla Wall, ss:

Comes now the Petitioners, Robert Draper, James Long, and Raymond Lorentzen and state:

This is to notify you as Chief Justice and the Court that a Mr. Thomas F. Lynch does not represent petitioners. That we opposed his appointment and have challenged his appointment and the county courts jurisdiction in the appointment.

On February 7, 1961, We informed the court that we were invoking our constitutional right to represent ourselves in all matters before the State Supreme Court.

As an attorney is defined by law as an agent, he must look to his principal for his authority. We have granted no authority to a Mr. Thomas F. Lynch to represent us before the Washington State Supreme Court.

The court is in possesion of a supporting brief in regards to the issue before the bar and we will rely on that brief, as nothing else is needed.

The court is also in possesion of our motion for personal appearance. Regardless of whether we have counsel present or not, we have a constitutional right to be present when this

matter is heard, as we have stated the law of the state in this matter.

As any matter pertaining to a defendant in actual custody takes precedence, and as action was started by laymans petition on December 17, 1961, and the filing of a writ in acceptable form in late January, A must insist that we be afforded

84 our constitutional rights.

We are here, in the Washington State Penitentiary, quite illegally, and a delay will not change that fact in any manner or form, and can serve no just or proper cause. We must insist on securing and protecting our constitutional rights. There is nothing special or unusual about this issue before the bar, it does not need a microscopic reading, or years of highly trained research to understand the issue, it is simple, and there are many cases on this subject, many from your own court. The supporting brief covers the issue. No other work or effort is necessary, and we will quite happily stand on the motion that is presently before the court, without any changes.

As we are the moving party and there has been no showing of "good cause" there is no legal grounds for a continuence.

Therefore, a continuence in this matter is without force or effect.

Also, I will point out that, since this request (presumably by Mr. Lynch) and action has come at such a late date, that its only purpose is to deprive us of our right to due process of law, and the equall protection of the law.

As this matter must be resolved by the laws, as they are now, no gain can be accomplished by a continuence. Especially when such a continuence is without force or effect or legal authority, and is designed to deprive petitioners of their constitutional rights.

As Mr. Lynch was in court when the original motion was heard, and he has not taken any action on his own before this, and since he was informed of my actions, and that we had filed a writ of Certiorari, any efforts on his part are quite late, and there true purpose must be very apparent to anyone.

Therefore, we move the court to deny the continuance and proceed to hear the issue as scheduled on March 10, 1961.

Respectfully Yours,

Robert Draper,
ROBERT DRAPER.
James Long,
JAMES LONG.
Raymond Lorentzen,
RAYMOND LORENTZEN.

Subscribed and sworn to before me this 8th day of March 1961.

F. J. Fink,
F. J. FINK.

Notary public in and for the State of Wash. residing in the County of Walla Walla.

85 [Affidavit of service by mailing omitted in printing.]

86 AUGUST 1, 1961.

Re: No. 35914; Robert Draper, James Long, and Raymond Lorentzen, Petitioners, *v.* State of Washington, Judge Hugh Evans, Spokane County Superior Court, Respondents.

MR. ROBERT DRAPER,
MR. JAMES LONG,
MR. RAYMOND LORENTZEN,
P.O. Box 520,
Walla Walla, Washington.

GENTLEMEN: Your petition for rehearing en banc has been received by this office and entered.

Rule on Appeal 50, RCW Volume 0, provides for petitions for rehearing in *appealed* cases. Under that rule, petitions for rehearing are not timely until after the opinion has been filed. Your case, of course, is not covered by Rule on Appeal 50 because no appeal is involved in cause No. 35914. However, it is clear that the policy of the court is not to entertain applications for rehearing until the decision in the first hearing is filed.

Your petition for rehearing is premature. The original has been placed in your file. The copies are being returned to you herewith. After the order in your cause is filed, you may resubmit your application for consideration by the court.

Very truly yours,

TIMOTHY CLIFFORD,
Acting Deputy Clerk.

TC:ch.
Enclosures.
cc: Basil L. Badley, Assistant Attorney General.

87 In the Supreme Court of the State of Washington
Olympia, Washington

Cause No. 35914

ROBERT DRAPER, ET AL, PETITIONERS

v.

STATE OF WASHINGTON, JUDGE HUGH EVENS, SPOKANE COUNTY SUPERIOR COURT, RESPONDENT

Motion for a rehearing and a hearing en banc

Filed July 28, 1961

AFFIDAVIT

STATE OF WASHINGTON,
County of Walla Walla, ss:

To: The Honorable Chief Justice of the Washington State Supreme Court:

[File endorsement omitted.]

1. Comes now the petitioners in cause number 35914, and moves this Court for a re-hearing in this cause before the Washington State Supreme Court en banc.

2. The purpose of this motion is to determine the Constitutional validity of Chapter 118, Laws of 1925, which is the purported basis for rule 5, rules on appeal, of the Washington State Supreme Court, which;

3. Is the purported authority by which petitioners were denied their Constitutional Right to be heard and to defend in person, as guaranteed by the Washington State Constitution, Article 1, Section 22, and Amendment 10, and as guaranteed by the Federal Constitution, during the Departmental Hearing in this matter on May 12, 1961.

4. Whereby, petitioners previous motions for personal appearance was denied by not producing petitioners at the Departmental hearing and affording them their Constitutional right to be heard, and to defend in person.

5. This action was done after petitioners had notified the Court that petitioners granted no authority to anyone to represent them in this Court by Registered Letter on February 7, 1961.

6. Thereby denying petitioners due process of law and equal protection of the laws as guaranteed by the Washington State Constitution, Article 1, Section 3, and by Section 1, of the 14th Amendment to the United States Constitution.

88 8. Petitioners move this Court to file this motion for the reasons and upon the grounds set forth in the following affidavit without cost to petitioners.

Comes now, Robert Draper, et al, petitioners and movants in Cause No. 35914, Washington State Supreme Court and affiants herein, and after being duly sworn on oath deposes and says:

1. That they are the petitioners and movants and affiants herein and the above entitled cause, know the contents thereof, and verily believe same to be true and correct to the best of their knowledge.

2. That they are citizens of the United States, competant to be witnesses; of legal age; that this action is taken in good faith; and is not repetitious.

3. That they are indigent persons, unable to pay costs or fees, and that Article 1, Section 22, and Amendment 10, of the Washington State Constitution does apply to petitioners in this matter:

"* * * right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

Rec'd 9-14-61.
In reply refer to No. 28228.

P.O. Box 520
Walla Walla, Wash.
September 4, 1961.

Hon. Robert C. Finley,
Chief Justice Supreme Court,
Temple of Justice,
Olympia, Washington.

Dear Sir: I have at hand a letter dated August 31st 1961. from the acting deputy clerk Mr. Timothy Clifford.

It is in regards to one of my petitions. Specifically a petition for a Writ of Certiorari in Yakima County cause number 8565.

I will point out that I have a Writ of Certiorari cause no. 35914 in this Court at this time, which was filed in Forma Pauperis.

It is true that there is no specific rule or statute granting me the right to file Certiorari in Forma Pauperis.

It is also true that there are none prohibiting it.

Also, I am guaranteed by the State and Federal Constitutions the right to petition and to due process of law.

I am a layman with inadequate reference materails, no training or experience in legal matters, to avoid a jurisdictional dispute, I will assume that this is a matter of judicial discretion.

I will call the Courts attention to the fact that this Certiorari is requested in an Error Coram Nobis proceeding in a criminal matter.

It is generally excepted that Error Coram Nobis will not lie in this State.

Since this Court and the Attorney General in 1942 said that it was not an available remedy.

Since then this Court has held that a motion to vacate will not lie in criminal matters.

I am not held under this past conviction directly, but this prior conviction is the basis for an additional five year mandatory minimum sentence being imposed upon me under this present conviction which I am appealing, and presently have under collateral attack, therefore, habeas corpus is not available.

The issues are real as a review of the Hon. Ian Mackie's memorandum opinion will disclose.

He did admit that I am entitled to relief but that Error Coram Nobis was not the proper remedy, if it were available.

This question of the availability of Error Coram Nobis and its true field of inquiry will have to be decided by this Court again before the Superior Courts of this State will grant relief under it, in my humble opinion.

My petition presents many interesting questions of law, that are of interest and benifit to the people of the State as well as myself.

I do believe that I am entitled to the redress I seek, and the additional five years that was imposed upon me gives me good cause to be greatly concerned by the final outcome in this matter.

I believe that my affidavit of pauperis is complete. The fact that I have been recognized in five courts should dispell argument on that point.

I note that my pauperis condition is not challenged and my ability to proceed is a matter of judicial discretion.

The purpose and intent of the rules of court was to put elasticity in the statutes.

I have no monies or property, I earn no wages, the only income that I might possibly have is from the sale of my blood. This is a possibility about four times a year at four dollars a pint.

93 I cannot be made to believe judicial process will require this type of payment before I am allowed to be heard.

If I am wrong I will forward the fee if and when I am allowed to donate another pint of blood.

Neither do I believe that this Court will hold a monetary barrier between me and a final determination of this matter.

In any event I cannot pay even a =38 dollar filing fee now, under normal conditions this is a small figure but under my present circumstances it is insurmountable for me at this time.

Therefore, I am forced at this time to respectfully ask the Court to consider these points and to officially grant a hearing or properly deny my petition for a Writ of Certiorari in Yakima County cause no. 8565.

I will take this opportunity to respectfully ask this Court to note this petition on the Courts motion calendar for determination in this regards on September 15, 1961, at its convenience.

Since this will be an ex parte proceeding, this letter will have to act as my pleading in this matter of proceeding in Forma Pauperis.

I have contacted the Prosecuting Attorney's Office informing him of my request for an early hearing date and informing him that if the dates that I suggested are not convenient for him I will then rely upon him to secure a hearing date that is convenient for him and the Court as long as it is acceptable to the normal practice and procedure and justice in general.

Therefore I am confident that he will be interested in the Court's final determination on my motion to proceed in Forma Pauperis.

I have received a reply rom the Prosecuting Attorney's Office just now bearing upon this subject. Copy enclosed.

At this time I will take the liberty to submit a motion for a hearing on September 15, and a Court order for this motion, for the Courts convenience.

I hope that this is proper, I don't mean to imply that I am trying to tell this august Court what to do, and I get lost in some of these procedural matters completely. Six months of reading and study doesn't make a very good layman even.

I am a very blunt man that is the reason that I have tried to cover this subject so completely.

I do not want to have to take this issue into the federal courts for determination at this time, so I am asking you to decide this matter.

In any event I must abide by the Courts decision and I will take this opportunity to thank the Court for whatever consideration that it gives to me and my petition and pleadings, thank you.

Very truly yours,

Robert Allen Draper.
ROBERT ALLEN DRAPER.
Petitioner Per Se, Pro Se.

cc: sent to: Prosecuting Attorney's Office, Mr. C. D. Fransen, Deputy Prosecuting Attorney, County Court House, Yakima, Washington.

94 SEPTEMBER 28, 1961.

Mr. THOMAS F. LYNCH,
1103 Paulsen Building,
Spokane 1, Washington.
Hon. JOHN J. LALLY,
Prosecuting Attorney,
Court House,
Spokane, Washington.

Re: No. 35914: State v. Long, Lorentzen, Draper.

GENTLEMEN: The opinion filed in this case today states in part as follows:

"The writ is quashed."

Very truly yours,

ALBERT C. BISE,
Acting Clerk.
By ARCHIE B. STEWART,
Deputy.

ABS: fh.

Copy to: Mr. Frank H. Johnson, Deputy Prosecuting Attorney, Spokane.

95 In the Supreme Court of the State of Washington
No. 35914
Department One
THE STATE OF WASHINGTON, PLAINTIFF
v.
JAMES DANIEL LONG, RAYMOND LEE LORENTZEN, AND ROBERT A. DRAPER, DEFENDANTS AND RELATORS; THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY, HUGH J. EVANS, JUDGE, RESPONDENT

Opinion

Filed September 28, 1961

The defendants were *tried and convicted on two counts of robbery* and were each *sentenced to serve two consecutive twenty-year terms.* They obtained permission to appeal in *forma pauperis* and applied to the trial court for free copies of the statement of facts. The trial court found their thirteen

obtained from him approximately five hundred dollars belonging to the motel. While this robbery was being committed, Long struck the clerk on the head with the butt of a gun. Lorentzen and Long ran back to the automobile, where Draper and Jennings were waiting and (according to prearranged plan) Draper drove the automobile to the Downtowner motel. There Long and Jennings went in, armed with a loaded weapon, and held up the night clerk, obtaining about eighteen hundred dollars. Jennings struck the clerk on the back of the head with the butt of a gun, and the two men ran back to the waiting car and drove off.

A police officer on patrol, observing Jennings and Long run from the motel and jump into the waiting car, followed them. A wild chase followed, during which the defendants fired a number of pistol shots. Their automobile was finally rammed by a pursuing police vehicle; Lorentzen and Long were captured; and in their possession was the money and other property taken from the motels. Draper and Jennings escaped, but were later captured.

Jennings, the accomplice, pleaded guilty and testified in detail at the trial of these defendants as to the preparation, planning, and execution of the robberies. His testimony was confirmed by his mother, who identified Draper as having been at the Jennings' residence on July 4th; by the testimony of the clerk on duty at the Davenport when the defendants checked in; and by the testimony of the two victims of the robberies, who described what took place.

98 The defendants did not testify at the trial and offered no testimony or evidence on their behalf.

Robbery is defined, RCW 9.75.010, as:

"• • •, the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. • • • (1909c249 §166. • • •)"

It is clear from the summary of the evidence which the trial court outlined in its order the correctness of which outline the

defendants do not challenge, that all of the elements of the crime of robbery were established by the evidence. None of the assignments of error is directed to the competency or materiality of this evidence.

In the seventh assignment of error, the defendants state that the judge should have dismissed the case because they are not guilty. We will assume, without deciding, that this assignment raises the question of whether there is sufficient evidence to sustain the convictions. The evidence outlined above, which the jury was entitled to believe, was sufficient proof to support the convictions.

In assignment No. 5, it is alleged that the presumption of innocence was never afforded the defendants. The trial judge's order points out that the jury was instructed specifically on the presumption; and it further points out that these objections were not raised or called to the court's attention. A question not raised in the trial court will not be considered on appeal. *Kane v. Smith*, 56 Wn. (2d) 799, 355 P. (2d) 827. This assignment of error is frivolous.

In regard to assignments No. 1, 2, 3, 6, 11, and 12,
99 the defendants also failed to raise their objections in the trial court; therefore, even if these assignments were meritorious, our rules would preclude a consideration of them. However, to allay any suspicion that we are summarily refusing to give them due consideration, we will point out therein they are also frivolous.

In the first, third, and fourth assignments of error, it is alleged that the witnesses contradicted each other and that one witness committed perjury. Many times, contradictions occur in the testimony of different witnesses; and it is for the jury to decide which witnesses, if any, are to be believed. These assignments do not refer to any alleged error of the court and are obviously frivolous.

In the second assignment, it is stated that the clothes and weapons introduced in evidence were not properly identified nor their ownership established. This goes to the weight of the evidence and not to its admissibility.

In assignment No. 6, the defendants state that the trial judge was prejudiced against them throughout the trial. The

judge denies this allegation. Under our rules of pleading, practice, and procedure, the right to disqualify a judge because of prejudice, must be by affidavit made prior to the judge's entering upon the trial of a matter. RCW 4.12.040, -.050. State v. Innocenti, 170 Wash. 286, 16 P. (2d) 439. Here the defendants' claim of prejudice (that on numerous occasions the judge sustained objections made by counsel for the state) was by oral assertion and was not timely; hence, this assignment of error is patently frivolous.

In assignments of errors Nos. 8 and 9, it is alleged that exhibits which should have been excluded were admitted over objections, and testimony was improperly allowed in spite of objection thereto. Manifestly, these allegations are too broad and indefinite to indicate what specific erroneous rulings of the court the defendants had in mind, and they have not been made more definite by the briefs before this court.

In their tenth assignment, the defendants contend that they were charged with robbing two specific companies that, in fact, were never proved to have been robbed. They base this contention on the fact that the two motels were incorporated, and that the state failed to prove their incorporation. This contention is without merit inasmuch as the evidence was that the defendants robbed the motels and took property from the possession of the clerks on duty. Proof of ownership of stolen property is not required—it being necessary only to prove that the property did not belong to the thief. State v. Hatch, 63 Wash. 617, 116 Pac. 286.

The defendants complain in their eleventh assignment that they were forced to sit at the same table with the two prosecutors, and a policeman who was subpoened as a witness. In regard to this, the trial court explained that it has been a practice of long standing that all parties and counsel sit at one table large enough to provide them all with adequate working room. As the trial court remarked, no conceivable prejudice resulted from this arrangement.

The twelfth assignment is that two witnesses sat in the courtroom after an order was issued excluding witnesses. If this were so, the defendants do not deny that it was never called to

the attention of the trial court. The findings of fact show that the court's attention was never called to the presence of any witnesses in the courtroom after the rule of exclusion
101 had been invoked. As the trial court stated, assuming that the witnesses were present, there was no showing of any prejudice to the defendants' case by reason of their presence. Manifestly this assignment is without substance.

The thirteenth assignment merely alleges that a statement of facts is necessary to prosecute the appeal.

It is evident that the defendants have alleged no substantial and material error. The court correctly held that their appeal was frivolous and refused to order the expenditure of county funds to supply them with copies of the statement of facts.

The writ is quashed.

ROSELLINI, J.

We concur:

FINLEY, C. J.
WEAVER, J.
FOSTER, J.
HUNTER, J.

102 In the Supreme Court of the State of Washington

September Session, A.D. 1961

No. 35914

THE STATE OF WASHINGTON, PLAINTIFF

v.

JAMES DANIEL LONG, RAYMOND LEE LORENTZEN, AND ROBERT A. DRAPER, DEFENDANTS AND RELATORS; THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY, HUGH J. EVANS, JUDGE, RESPONDENT

Judgment

November 3, 1961

This cause having been heretofore submitted to the Court upon the application of the relator for a writ of certiorari to review an Order in that certain cause in which The State of

Washington is Plaintiff and James Daniel Long, Raymond Lee Lorentzen, and Robert Draper, are Defendants and Relators, in the records of the Superior Court of the State of Washington in and for Spokane County being cause No. 19005 of said Court, and the Court having fully considered the said cause and the said its opinion in writing, quashing the writ, and on motion of John J. Lally, Prosecuting Attorney, of counsel for respondent, it is ordered, adjudged and decreed that the writ be and the same is quashed. And it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

I, William M. Lowry, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a true copy of the Judgment and Decree in said cause, as the same now remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 3rd day of November, A.D. 1961.

WILLIAM M. LOWRY,
Clerk of the Supreme Court, State of Washington.

103 In the Supreme Court of the State of Washington

No. 35014

STATE OF WASHINGTON, PLAINTIFF

v.

JAMES DANIEL LONG, RAYMOND LEE LORENTZEN AND ROBERT A. DRAPER, DEFENDANTS AND RELATORS; THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY, HON. J. EVANS, JUDGE, RESPONDENT

Order directing clerk to transmit to the clerk of the United States Supreme Court the entire record in this case.

August 31, 1962

Whereas, the defendant above named is about to file with the clerk of the United States Supreme Court his Petition for Certiorari seeking a review of the judgment of this court entered herein on September 28, 1961, and

Whereas, under the practice of this court, the record before this court on appeal is not a printed record; and

Whereas, the relator, Robert A. Draper, has filed an affidavit of indigency, and is without funds to obtain copies; and it appearing that it is therefore necessary and proper that the entire original file in this cause be transmitted by the clerk of this court, under his proper certificate, to the clerk of the United States Supreme Court;

104 Now, therefore, in consideration of the foregoing,

It is hereby ordered and directed that the clerk of this court shall promptly:

(a) Forward by railway express to the clerk of the United States Supreme Court, Washington, D.C., the entire original file in this cause;

(b) Forward with said original file, his proper certificate, under the seal of this court, certifying that the file as transmitted contains the entire record of this court in this cause;

(c) Furnish to Robert A. Draper, pro se, original and four copies of a list, itemizing the documents transmitted to the clerk of the United States Supreme Court pursuant to the foregoing paragraph.

It is further ordered that a certified copy of this order shall be included in said original file.

Done in Chambers at the Temple of Justice, Olympia, Washington, this 31st day of August, 1962.

CHARLES T. DONWORTH,
Acting Chief Justice of the Washington State Supreme Court.

105 [Clerk's certificate to foregoing transcript omitted in printing.]

106 Supreme Court of the United States

No. 817 Misc., October Term, 1961

ROBERT DRAPER AND RAYMOND LORENTZEN, PETITIONERS

v.

WASHINGTON ET AL.

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari

June 25, 1962

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE WASHINGTON

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1064 and placed on the summary calendar and set for argument immediately following No. 476.

June 25, 1962

Mr. Justice Frankfurter took no part in the consideration or decision of this motion and petition.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 201

ROBERT DRAPER AND RAYMOND LORENTZEN,

Petitioners,

vs.

WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONERS

CHARLES F. LUCE
Attorney for the Petitioners
1002 N. E. Holladay Street
Portland 8, Oregon

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 201

ROBERT DRAPER AND RAYMOND LORENTZEN,

Petitioners,

vs.

WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of Justice Rosellini for Department One of the Supreme Court of the State of Washington (R. 77) is reported at 58 Wash. 2d 830, 365 P. 2d 31 (1961).

Jurisdiction

The order granting motion for leave to proceed *in forma pauperis*, and granting the petition for certiorari, was entered on June 25, 1962 (R. 85). The jurisdiction of this court rests on 28 U.S.C. 1257.

Questions Presented

1. Whether, consistent with the Equal Protection and Due Process clauses of the Fourteenth Amendment, a state may refuse poor persons, but not others, the right of appeal in felony cases whenever the trial judge finds their claims of error are "frivolous."

2. Whether, as regards the supplying of free transcripts in appeals *in forma pauperis* from felony convictions, the rules applied by the courts of Washington satisfy Equal Protection and Due Process. (See *Woods* v. *Rhay*, 54 Wash. 2d 36 at 44-45, 338 P. 2d 332 at 337 (1959).)

3. Whether the petitioners, who were convicted and sentenced to a maximum of 40 years in the state penitentiary, are entitled under Equal Protection and Due Process to receive a free transcript of the testimony at their trial so that they may obtain the same appellate review of alleged errors as if they had money to buy the transcript.

Statement

On August 3, 1960, both petitioners were charged with two counts of robbery in a joint information filed by the Prosecutor of Spokane County, Washington, in the Superior Court of the State of Washington for Spokane County (R. 1-2). Being without funds, petitioners requested and were provided court-appointed counsel (R. 33). They were tried by a jury September 12-14, 1960, and found guilty on both counts (R. 3-4).

On September 15, 1960, petitioners filed motions for new trial alleging errors of law and fact (R. 3). September 30, 1960, their motions were denied (R. 3-4). They were ad-

judged guilty and sentenced to maximum terms of 40 years in the state penitentiary at Walla Walla (R. 4-7).

On October 20, 1960, petitioners filed timely notices of appeal from the judgments of conviction (R. 8-9). Five days later they filed identical motions and affidavits requesting a free transcript of the record and statement of facts (R. 10-13). [Washington practice refers to copies of the various documents filed with the clerk of the trial court as the "transcript of the record," Rule 44 of Rules on Appeal; and to the court reporter's transcription of trial proceedings as the "statement of facts," Rule 35 of Rules on Appeal, RCW, Vol. "O," Appeal—pp. 22.1-24 and 16, 34A Wash. 2d 47-49 and 38.]

The rules laid down by the Supreme Court of Washington which govern the supplying of free transcripts are as follows:

> "1. An indigent defendant in his motion for a free statement of facts must set forth:
>
> "a. The fact of his indigency
>
> "b. The errors which he claims were committed; and if it is claimed that the evidence is insufficient to justify the verdict, he shall specify with particularity in what respect he believes the evidence is lacking. (The allegations of error need not be expressed in any technical form but must clearly indicate what is intended.)
>
> "2. If the state is of the opinion that the errors alleged can properly be presented on appeal without a transcript of all the testimony,
>
> "a. it may make a showing of what portion of the transcript will be adequate, or

"b. if it believes that a narrative statement will be adequate, it must show that such a statement is or will be available to the defendant.

"3. The trial court in disposing of an indigent's motion for a statement of facts at county expense shall enter findings of fact upon the following matters:

"a. The defendant's indigency

"b. Which of the errors, if any, are frivolous and the reasons why they are frivolous[5]

"c. Whether a narrative form of statement of facts will be adequate to present the claimed errors for review and will be available to the defendant; and, if not

"d. What portion of the stenographic transcript will be necessary to effectuate the indigent's appeal.

"4. The trial court's disposition of the motion shall be by definitive order." *Woods* v. *Rhay*, 54 Wash. 2d 36 at 44-45, 338 P. 2d 332 at 337 (1959).

"[3] Where court-appointed counsel has represented the defendant at the trial, his services should be made available to the defendant for the purpose of presenting the motion.

"[4] See *State* v. *James*, 252 Minn. 243, 89 N.W. (2d) 904, 906.

"[5] For an example, see Judge Roney's letter in *In re Grady* v. *Schneckloth*, 51 Wn. 2d 1, 8; 314 P. (2d) 930."

In accordance with these rules, each petitioner alleged in support of his motion for free transcript that he had no funds (R. 10, 12), and that "unless [he] is provided with a transcript and statement of facts at the county expense, he will be unable to prosecute this appeal" (R. 11, 13). Each listed thirteen "errors committed in the trial," including:

"(6) That the trial Judge was prejudiced against the Defendants throughout the entire trial.

"(7) That the trial Judge should have dismissed the case as the Defendants are not guilty as charged.

"(8) That exhibits were entered over objections that should not have been allowed to be entered.

"(9) That testimony was allowed over objections that should not have been allowed" (R. 10-11, 12-13).

On November 25, 1960, the Prosecutor of Spokane County served upon petitioners' counsel a "Counter-affidavit resisting motion for free transcript" (R. 19-22). The Prosecutor did not deny the petitioners' allegations of poverty, nor that they would be unable to prosecute the appeals unless given a free transcript of all the testimony (R. 19-22). His counter-affidavit did allege evidence which, he believed, established petitioners' guilt "overwhelmingly" (R. 22), and he contended "that there is no merit in any of the allegations of error . . ., that these are frivolous appeals" (R. 22).

On November 28, 1960, petitioners' motions for free transcript of record and statement of facts were heard before the trial judge who had presided at the jury trial (R. 32-33). Petitioners' counsel, who had represented them at the trial, raised the federal constitutional issue of their right to a free transcript (R. 36 and see R. 43, 48-49), and asserted it would take substantially all of the record to review the petitioners' contentions (R. 36). He contended that the state had failed to prove the existence of one of the corporations alleged to have been robbed (R. 36); that the petitioner Draper had been identified at the scene of the crimes by only one person, an alleged accomplice who had pleaded guilty (R. 35-36); and that prejudicial error had

been committed by the trial court's admitting as exhibits an improperly identified gun and a jacket with allegedly stolen money in the pocket (R. 38).

The petitioner, Mr. Draper, also presented oral argument at the hearing on his motion for free transcript and statement of facts (R. 39-45). The trial judge asked Mr. Draper to discuss each of his 13 allegations of error (R. 40), and he attempted to do so (R. 40-43). Illustrative of this colloquy is Draper's discussion of his contention that testimony was improperly allowed over objections:

> "Mr. Draper. * * * There is testimony which was objected to but which was allowed to stand, and in some cases you instructed the reporter to have it stricken from the record, and there was nothing in the instructions to contradict that, and any time you speak in court, that is an instruction, if it is not directed to the prosecutor or to defendant's counsel, the jury listens to it all.
>
> "The Court. What did I say?
>
> "Mr. Draper. If you offer an opinion, or a thought, or anything to show how you feel.
>
> "The Court. What did I do?
>
> "Mr. Draper. I don't remember, because I don't have the transcript, but I remember a very great feeling at the time of the trial over this". (R. 41).

The Prosecutor sought to refute the arguments of petitioners' counsel, and of Mr. Draper, by reciting his own recollection of the evidence at the trial (R. 46-48). He summarized his contention that petitioners were not entitled to free transcript (and, therefore, not entitled to an appeal) as follows:

> "* * * In short, your Honor, my view of these errors is that they don't allege in any particular, any mate-

> rial or substantial error in this case. In fact, my impression of the arguments on behalf of Mr. Draper —conceding again that he is not a lawyer—is that he doesn't know what is in the record and he would like a free transcript so he can see if there is anything in support of these claims of error" (R. 48).

At the conclusion of the hearing, the trial judge announced that, in passing upon the motion for free transcript, "it is for the Court to determine whether or not there is any merit to the claims of error which have been made here" (R. 49). "It is," he said, "the overall picture that we have to look at" (R. 49). He concluded that the evidence of petitioners' guilt was "overwhelming," that the motion for free transcript was frivolous, and should be denied (R. 53). However, the trial judge noted, in his oral opinion,

> "• • • that does not prevent the Supreme Court from reviewing this matter, because this Court is making findings of fact, which will set forth the substance of the testimony that supports the necessary allegations and proof of robbery, and that can be presented to the Supreme Court by certiorari, which is a procedure available to you, and if the Supreme Court says there is a question here which justifies Spokane County paying the expense of the appeal by making available to you a full transcript, that will be done" (R. 53).

In accordance with his opinion from the bench, the trial judge on December 12, 1960, entered formal findings of fact and conclusions of law and order denying free transcript (R. 23-31). The trial judge did not find, either in his oral opinion or his formal findings, that the petitioners could obtain appellate review of their allegations of error

with anything less than a complete transcript of the court reporter's notes taken during the trial (R. 48-53, 23-29).

On February 8, 1961, petitioners requested the Supreme Court of Washington to review in a certiorari proceeding the ruling of the Superior Court for Spokane County denying them a free transcript (R. 55-58).

On February 13, 1961, the State Supreme Court ordered the review "in accordance with the rules announced in In re Woods v. Rhay (1959), 54 Wash. 2d 36" (R. 58-59).

On September 28, 1961, the Supreme Court of the State of Washington, Department One, by Rosellini, *J.*, announced a unanimous opinion that the petitioners were not entitled to a free transcript of record or statement of facts. The State Supreme Court, without benefit of transcript of the trial proceedings, determined that each of the 13 assignments of error was "frivolous" (R. 77-82).

By order entered June 25, 1962, this court granted the petitioners' motion for leave to proceed *in forma pauperis*, and granted their petition for certiorari (R. 85).

Summary of Argument

I

Equal Protection and Due Process require that states granting the right of appeal in felony cases grant it alike to the poor and the rich. Such states therefore must supply free transcripts of the trial proceedings for indigent appellants when necessary to assure adequate and effective appellate review. *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958); compare *Burns* v. *Ohio*, 360 U.S. 252 (1959); and *Smith* v. *Bennett*, 365 U.S. 708 (1961).

About 50 per cent of the men and women charged with major crimes in state courts have no money to conduct a defense or prosecute an appeal. If Equal Protection of the Laws and Due Process are to be a reality for these unfortunate Americans, this Court must continue to extend a protective arm in cases such as this one.

II

The procedures of the State of Washington in criminal appeals have the effect of discriminating against appellants who cannot afford to buy a transcript, and are therefore unconstitutional.

A. The Constitution of Washington expressly grants the right of appeal in all criminal cases. Constitution of Washington, Amendment Ten, RCW, Vol. "O," p. 98.

B. Nevertheless, the Supreme Court of Washington ordinarily will not consider an appeal unless the appellant supplies the court with a transcript of the portion of the trial proceedings in which he alleges error was committed. Rules 34-40 of Rules on Appeal, Statement of Facts, etc., RCW, Vol. "O," Appeal—pp. 15-30, 34A Wash. 2d 36-58; *Woods* v. *Rhay*, 54 Wash. 2d 36 at 42-45, 338 P. 2d 332 at 336-337 (1959).

C. When the appellant is financially able to buy a full transcript of the trial proceedings, the Supreme Court of Washington grants a full appellate review of these proceedings—regardless of what the trial judge may think of the merits of the appeal. Rule 46, Appeals in Criminal Cases, RCW, Vol. "O," Appeal—pp. 24-26, 34A Wash. 2d 50-53. Indeed the appellate procedure for persons with means does not afford the trial judge an opportunity to express his view on the merits of the appeal. Rule 46(4).

Rules on Appeal, Appeals in Criminal Cases, RCW, Vol. "O," Appeal—p. 25, 34A Wash. 2d 50 at 51.

The Washington practice does not permit the dismissal of a criminal appeal upon summary motion when the prosecution contends it is "frivolous." If paid for, and all procedural requirements complied with, such an appeal is heard by the Supreme Court with oral argument and full consideration. Rule 46, Appeals in Criminal Cases; Rule 49, Arguments; and Rule 63, Appeals to be Heard on Merits. Rules on Appeal, RCW, Vol. "O," Appeal—pp. 24, 27, 35, 34A Wash. 2d 50, 54 and 65.

D. Indigent defendants are not accorded an equal right of adequate and effective appellate review in criminal cases. A poor person convicted of a felony can appeal only if he can obtain a free transcript, and he can obtain a transcript only if the trial judge believes that his grounds for appeal are not "frivolous." *Woods* v. *Rhay,* 54 Wash. 2d 36 at 44-45, 338 P. 2d 332 at 337 (1959); *State* v. *Long et al.,* 58 Wash. 2d 830, 365 P. 2d 31 (1961) (R. 77); Rule 46(11) of Rules on Appeal, Appeals in Criminal Cases, RCW, Vol. "O," Appeal—p. 26, 34A Wash. 2d 52-53.

If the trial judge decides that his contentions are patently without merit, and therefore "frivolous," the poor person may have this decision reviewed by the Supreme Court of Washington in a certiorari proceeding. *Woods* v. *Rhay,* 54 Wash. 2d 36 at 45, 338 P. 2d 332 at 338 (1959). But the review, made without a transcript, is so limited as to be meaningless.

Indigent appellants who successfully run this procedural gamut and finally succeed in obtaining a free transcript, then must prosecute their appeals from the beginning. By reason of poverty, they will have lost months, perhaps years, in obtaining appellate review. Being unable to raise

bail, they will have been deprived of their liberty throughout this period.

There is no justification for the State of Washington thus to handicap the impoverished defendant. The cost of having the court reporter transcribe his trial notes is inconsequential when compared with the total cost incurred by the state to provide adequate law enforcement, a judicial system, and penal institutions. But whatever the cost, the Constitution does not attempt to weigh liberty on the same scales as gold.

III

Since Washington allows those who have funds to obtain full appellate review of the transcript of their trial proceedings, it must supply the petitioners with a free transcript so that they, too, may obtain adequate and effective appellate review. *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958).

ARGUMENT

As matters stand, the petitioners, sentenced to 40 years in the penitentiary, never will be allowed to appeal unless this Court requires the State of Washington to provide them a transcript at public expense. We contend that the Equal Protection and Due Process clauses, and the decisions of this Court construing them, entitle the petitioners to receive a transcript so that they may obtain the same appellate review as if they had money to buy the transcript.

We further contend that the rules of the Supreme Court of Washington, announced in *Woods* v. *Rhay*, 54 Wash. 2d 36 at 44-45, 338 P. 2d 332 at 337 (1959), governing requests of indigent appellants for free transcripts, violate the

Equal Protection and Due Process clauses. When read together with the other rules of the State of Washington on criminal appeals, they impose a much heavier burden on the indigent appellant than on the non-indigent appellant, and do not provide poor persons with adequate and effective appellate review.

I.

Equal Protection and Due Process require that states granting the right of appeal in felony cases grant it alike to the poor and the rich. Such states therefore must supply free transcripts of the trial proceedings for indigent appellants when necessary to assure adequate and effective appellate review.

This Court has not yet held that persons convicted of felonies are constitutionally entitled to an appeal. But it has unequivocally decided that when a state grants the right of appeal it must do so on equal terms for the rich and the poor.

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. * * *
>
> "* * * [T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no

> equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate an appellate review as defendants who have money enough to buy transcripts." *Griffin* v. *Illinois*, 351 U.S. 12, 18, 19 (1956).

Illinois has therefore been required either to furnish a free transcript of testimony, or to find other means of affording "adequate and effective appellate review," for an indigent defendant in a case where the state did not deny that the record might show prejudicial error. *Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956). The State of Washington, similarly, has been required to furnish a free transcript to an indigent appellant even though the trial judge had refused his request, and had found that "justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and . . . no grave or prejudicial errors occurred therein." *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 215 (1958).

> "The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 at 216 (1958).

Subsequent decisions of this Court have extended the principle of *Griffin* and *Eskridge* to other types of fees which states collect from appellants in criminal proceedings. Ohio has been required to allow an indigent's appeal to the state's highest court although he could not pay the filing fee—and although appeals to Ohio's highest court

are by leave and not of right. *Burns* v. *Ohio*, 360 U.S. 252 (1959).

> "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." 360 U.S. at 258.

Iowa has been required to waive its filing fee in habeas corpus proceedings so that indigent prisoners could present their petitions on the same basis as non-indigents. *Smith* v. *Bennett*, 365 U.S. 708 (1961).

If Equal Protection of the Laws and Due Process of Law are to be a reality in our country, this Court must continue to extend its protective arm to indigent criminal defendants. Paupers constitute a high percentage of the men and women charged with violation of criminal laws. In the federal court system, it has been estimated as about 25%; in the district court for the District of Columbia, about 45%. Boskey, *The Right to Counsel in Appellate Proceedings*, 45 *Minn. L. Rev.* 783, n. 1 (1961). The Attorney General of the United States recently told the convention of the American Bar Association that,

> "Last year, almost thirty percent of the defendants in the 34,008 criminal cases in Federal court could not afford counsel. In the District of Columbia, where the Federal District Court hears all felony cases, over half the defendants had to be assigned attorneys. The situation in the states is comparable." *Address of Attorney General of the United States Robert F. Kennedy*, 85th Annual Meeting, House of Delegates, American Bar Association, August 6, 1962.

In the state courts, indigents probably constitute an even higher percentage of the defendants in criminal actions.

The National Legal Aid and Defender Association, of which the Chief Justice of this Court is Honorary President, estimates that "Our own surveys of state Public Defenders indicate that at least fifty per cent of all defendants indicted are too poor to provide their own counsel and must be represented by Public Defenders." See Appendix "A." Cases such as the present case test whether these unfortunate Americans will receive justice.

II.

The procedures of the State of Washington in criminal appeals have the effect of discriminating against appellants who cannot afford to buy a transcript, and are therefore unconstitutional.

A. *The Constitution of Washington expressly guarantees "the right of appeal in all criminal cases." Constitution of Washington, Amendment Ten, RCW, Vol. "O," p. 98.* Indeed, the Constitution of Washington further guarantees that,

> "In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights [of appeal, etc.] herein guaranteed." *Ibid.*

The latter provision has been construed by the Supreme Court of Washington not to apply to appellate proceedings. *State ex rel. Mahoney* v. *Ronald*, 117 Wash. 641, 202 Pac. 241 (1921).

B. *The Supreme Court of Washington ordinarily will not consider an appeal unless the appellant supplies the court with a transcript of that part of the trial proceedings in which he alleges error was committed.*

Petitioners do not seek a free transcript of their trial just for an exercise or a diversion. They seek the transcript

because, being poor, they cannot attain appellate review of their 40-year sentences without first obtaining the transcript. It is the *sine qua non* of their appeals.

As a general rule, the Supreme Court of Washington will not consider an appeal unless the appellant supplies a transcript of the portion of the trial proceedings in which he alleges error occurred. An appeal will be dismissed by the Clerk of the Supreme Court upon three days' notice if such a transcript is not timely filed. Rule 46(11) of Rules on Appeal, Appeals in Criminal Cases, RCW, Vol. "O," Appeal—p. 26, 34A Wash. 2d 50 at 52-53.

The few exceptions to this general rule are not available to petitioners. They apply where the appeal presents solely a question of law, or the parties agree upon a narrative statement summarizing the facts essential to decision of the alleged errors. *Woods* v. *Rhay*, 54 Wash. 2d 36 at 42, 38 P. 2d 332 at 336 (1959). Petitioners' allegations of error—prejudice of the trial judge, insufficiency of evidence, and improper admission of testimony and exhibits—cannot be considered on their merits without a full transcript of the court reporter's notes. So clearly is this true that the Prosecutor in his affidavit opposing a free transcript did not contend that the alleged errors could be reviewed with anything less than a full transcript (R. 19-22).

The trial judge in his "findings of fact" did not find that the petitioners' contentions of error could be decided on their merits with an agreed statement of facts, or with any other substitute for a complete transcript (R. 23-29). The silence of the trial judge's findings on this point is the more significant because the rules of the Washington Supreme Court in these cases require specific findings of fact on

"• • • •

"3. Whether a narrative form of statement of facts would be available to defendant and adequate to present for review of the claimed errors." *Woods v. Rhay*, 54 Wash. 2d 36 at 45, 338 P. 2d 332 at 337 (1959).

C. *When appellants are able to buy a full transcript of their trial proceedings, the State of Washington grants them a full and direct appellate review.*

An appellant with funds has an easy and direct appeal to the Supreme Court of Washington in all criminal cases. Within 30 days after the entry of judgment, he files a notice of appeal in duplicate with the Clerk of the Superior Court in which he was convicted. Rule 46 of Rules on Appeal, Appeals in Criminal Cases, RCW, Vol. "0," Appeal—p. 24, 34A Wash. 2d 50. Thereafter within the several time limits prescribed by Rule 46, he must:

(1) Transmit to the Clerk of the Supreme Court the portions of the Clerk of the Superior Court's files he believes relevant,

(2) Serve and file with the Clerk of the Superior Court the statement of facts (i.e., all or the relevant portions of the transcription of the court reporter's notes and the exhibits),

(3) Obtain the trial judge's certification of the accuracy of the statement of facts,

(4) Pay the Clerk of the Supreme Court a $5.00 docket fee, and

(5) File his brief.

When he has done these things, his case is docketed for hearing by the Supreme Court. Rule 11, Assignment of

Causes, and Rule 12, Calendar. Rules on Appeal, RCW, Vol. "O," Appeals—p. 5, 34A Wash. 2d 19.

At no stage in perfecting his appeal must the pecunious appellant convince the trial judge that his appeal is not "frivolous." If he has the price charged by the clerk for certified copies of documents in his file ($2.00 for the first page, plus $1.00 for each additional page), and the price charged by the court reporter for transcribing his notes (.60¢ per page for the original, plus .60¢ per page for the first carbon copy and .30¢ per page for additional carbon copies), he gets before the Supreme Court regardless of what the trial judge may think of his allegations of error. In fact, the pecunious appellant is not required to disclose his contentions of error until he files his opening brief, and the trial judge never gets the opportunity to comment upon them. Rule 42, Contents and Style of Brief; Rule 43, Errors Considered; Rule 46, Appeals in Criminal Cases. Rules on Appeal, RCW, Vol. "O," Appeal—pp. 20, 22.1, 24; 34A Wash. 2d 44, 47.

D. *Indigent defendants in the State of Washington are not accorded an equal right of adequate and effective appellate review in criminal cases.*

Under Washington procedures, an indigent defendant travels a tortuous road in seeking appellate review. His filing of the Notice of Appeal with the Clerk of the Superior Court does not present difficulty. But then his trouble begins. He cannot order the clerk to certify the court files, nor the court reporter to transcribe the trial notes; this takes money. His next step must be to petition the trial judge for a free transcript of record and statement of facts. The rules which guide the trial judge in disposing of his petition, as laid down in *Woods* v. *Rhay*, 54 Wash. 2d 36, 338 P. 2d 332 (1959), are quoted in full in the Statement, pp. 3-4, above.

As administered by the courts of Washington, the rules governing free transcripts come to this: If the trial judge, acting upon his recollection of the trial, believes that the grounds for appeal are "not frivolous" the appellant gets a free transcript of record and statement of facts, and may proceed with the other steps in perfecting his appeal. If the trial judge thinks the appeal "frivolous," the appellant gets no transcript or statement, and his appeal is blocked.

The indigent appellant, if denied a record by the trial court, will have his appeal dismissed for failure to supply the record. Rule 46(11) of Rules on Appeal, Appeals in Criminal Cases, 34A Wash. 2d 50-53, RCW, Vol. "0," Appeal—pp. 24-26. It is true that he may have the order of denial reviewed by the Supreme Court of Washington in a certiorari proceeding. *Woods* v. *Rhay*, 54 Wash. 2d 36 at 45, 338 P. 2d 332 at 338 (1959). But this review proceeding does not place the statement of facts, nor any part thereof, before the Supreme Court. It places before that court only the trial judge's "findings of fact" reciting "which if any of the errors were frivolous and the reasons why."

If the appellant in a certiorari proceeding nevertheless can convince the Supreme Court that the trial judge has given bad reasons for thinking the grounds of appeal "frivolous," he gets a free transcript of record and statement of facts. He can then resume his appeal, by filing these documents, and proceeding with the other steps prescribed by Rule 46.

By the time an indigent appellant has run this obstacle course, months and maybe years will have elapsed. The petitioners, for example, filed their notice of appeal on October 20, 1960. Being unable to raise bail, as a moneyed appellant often can, they are deprived of their liberty throughout the period of the delay.

Clearly the rules applied by courts of Washington in the granting of appeals, and the provision of free transcripts in criminal appeals, deny Equal Protection and Due Process of Law to poor persons. They do not meet the test of Equal Protection and Due Process laid down in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). They "effectively [deny] the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Id.* p. 18.

Nor does the Washington procedure for indigents' appeals meet the requirements of Equal Protection and Due Process as specified in *Eskridge* v. *Washington*, 357 U.S. 214 (1958). *Eskridge* involved the validity of an earlier version of Washington's rules for determining whether indigent appellants are entitled to receive free transcripts. In all important respects the rules considered in *Eskridge* were the same as the rules involved here. There is only this difference: The former rules provided that the indigent appellant receive a free transcript if, in the trial judge's opinion, "justice would be promoted." Under the present rules the indigent appellant receives a free transcript if, in the trial judge's opinion, the allegations of error are "not frivolous."

The constitutional defects in Washington's procedures, noted *Per Curiam* in *Eskridge*, were not cured by the substitution of a new verbal formula to be applied by the trial judge. The new formula puts the defendant at the same disadvantage as the old formula. In order to place his appeal before the Supreme Court, he still has to convince the trial judge whose conduct of the trial he is challenging that his contentions of error have merit, whereas all other appellants are allowed a direct appeal to the Supreme Court. And he must do this without the help of a transcript of the testimony at the trial. This Court said in *Eskridge* that

> "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 216 (1958).

In the words of Mr. Justice Stewart, "Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial." Concurring opinion, *Coppedge* v. *United States*, 369 U.S. 438 at 455, 456 (1962).

There is no justification for the State of Washington or any other state handicapping the improverished defendant by making it difficult to obtain a free transcript. The cost to the state of employing the court reporter to transcribe his notes is inconsequential, compared to the total cost of administering justice, for example, the costs required to provide sheriffs' offices, court houses, judges, juries, clerks, court reporters, bailiffs, jails, penitentiaries, etc. But whatever the cost, the Constitution does not attempt to weigh liberty on the same scales as gold.

The state which bears the burden and costs of establishing guilt beyond reasonable doubt, of providing impartial and able triers of fact and law, of insuring that clerical procedures safeguard due process of law, of publishing the results from the judicial process—this sovereign should not balk at supplying transcripts of record adequate to accomplish for all the judicial review which the state maintains. The bogey behind "opening the door" may be suggested, but this Court has noted that the feared flood of released felons resulting from *Griffin* v. *Illinois* has not materialized. *Mapp* v. *Ohio*, 367 U.S. 643, 659, n. 9 (1961).

It may also be suggested that poor defendants if provided free transcripts would appeal more readily, and clog the courts with unfounded appeals. But the suggestion assumes that rich defendants are deterred from appealing by financial considerations. It seems unlikely that a moneyed man, convicted of robbery and sentenced to a maximum of 40 years in the penitentiary, would forego an appeal in order to save his money. There will always be unfounded appeals, and they will not be limited to paupers' appeals.

Criminal appeals by indigents convicted of serious felonies are not to be treated as suspect, so that a special showing on these cases alone is necessary to perfect an appeal. In the words of this Court, "if frivolous litigation exists we are not persuaded that it is concentrated in this narrow, yet vital, area of judicial duty." *Coppedge* v. *United States*, 369 U.S. 438 at 450 (1962). The context of these words is illuminating:

> "Even-handed administration of the criminal law demands that these cases be given no less consideration than others on the courts' dockets. Particularly since litigants *in forma pauperis* may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition, is appellate review any less searching than that accorded paid appeals inapp opriate. Indigents' appeals from criminal convictions cannot be used as a convenient valve for reducing the pressures of work on the courts. If there are those who insist on pursuing frivolous litigation, the courts are not powerless to dismiss or otherwise discourage it." *Coppedge* v. *United States*, 369 U.S. 449-450.

Conclusion

The petitioners are admittedly without funds. They have been convicted of robbery and sentenced to a maximum of forty years in the state penitentiary. Under the rules of the Supreme Court of Washington, as applied here, they have been denied a free transcript and thereby have been denied the right of appeal which a moneyed appellant could obtain. This constitutes a denial of Equal Protection of the Laws and a deprivation of liberty without Due Process of Law.

The judgment of the Supreme Court of Washington should be reversed, with instructions that petitioners be given a free transcript of the proceedings at their trial in order that they may perfect their appeal to the Supreme Court of Washington.

Respectfully submitted,

CHARLES F. LUCE,
Attorney.

November 1962

APPENDIX A

(Letterhead of National Legal Aid and Defender Association, Chicago 37)

August 20, 1962

Mr. Charles F. Luce
Bonneville Power Administration
P. O. Box 3537
Portland 8, Oregon

Dear Mr. Luce:

Sol Rubin of the National Council on Crime and Delinquency has asked us to give you further information on the question raised in your letter of August 3rd addressed to him. Unfortunately, we do not have specific information on all the matters you mentioned. The Administrative Office of the United States Courts in Washington, D.C. may be able to give you statistics on some of your questions.

I also refer you to the *Minnesota Law Review*, Vol. 45, No. 5 (April 1961) which was devoted to a symposium on "The Right to Counsel." There are twelve articles dealing with this subject in the volume.

We know the Administrative Office of the U.S. Courts reports that about 35,000 persons annually are accused of crime in the federal courts, and that one out of every four defendants there is represented by assigned counsel. (The Los Angeles County Public Defender reported 23,626 cases in the year 1959-60.) Our own surveys of state Public Defenders indicate that at least fifty per cent of all defendants indicted are too poor to provide their own counsel and must be represented by Public Defenders.

As to the free transcript question, I know you must be familiar with the case of *Griffin* v. *Illinois*, 351 U.S. 12, the first leading case holding that there was a denial of due process for the state to refuse to furnish a free copy of the transcript of the trial testimony when such transcript is a prerequisite to obtaining an appellate review.

Sincerely,

/s/ Junius L. Allison

Junius L. Allison
Executive Director

JLA:jm
C.C. Mr. Sol Rubin

(Letterhead of National Legal Aid and Defender Association, Chicago 37)

August 24, 1962

Mr. Charles F. Luce
Bonneville Power Administration
P. O. Box 3537
Portland 8, Oregon

Dear Mr. Luce:

As a further answer to your inquiry of August 3, 1962, made to the National Council on Crime and Delinquency and referred to us, I send you the enclosed summary which we made of a spot survey of a few large cities where no Defender organization exists.

Sincerely,

/s/ Junius L. Allison

Junius L. Allison
Executive Director

JLA:jm
Enc.

A spot check (by questionnaires to clerks of court) of the actual number of indictments returned in 1960 in some of these cities reveals the following:

City	No. of Indictments	Counsel Appointed for Indigent
Denver	1,223	531
Nashville	1,177	No record
Fort Worth	1,586	240
San Antonio	952	200
Paterson	821	Everyone has to have counsel
Newark	2,076	731 plus 18 for murder
Jacksonville	6,208	No record
Kansas City	173	No record
Crown Point	18 (29 defendants)	14
Syracuse	314	152
Portland (Oregon)	586	296
Milwaukee	1,470	665
Macomb County, Mich.	480	47
Media, Pa.	1,994	Not known–(Voluntary Defender Committee represented 192)

As a further indication of need in these heavily populated counties, comparison might be made with the population covered and the volume of cases handled by existing Defender offices which report their cases and operating costs.

Despite their limited coverage, 71 offices reporting to NLADA for the year 1960 handled 116,568 new criminal cases. There is a total population of 57½ million in these counties. So, more than two cases are handled out of every 1,000 population. Applying this figure to the 28 million in the large non-defender counties, it may be assumed that

there are approximately 56,000 indigent defendants before the courts each year who must rely upon a court-appointment system for representation or none at all. This and the fact that there are scores of other counties with a population range of 200,000-400,000, without Defender services, reveals a critical problem not only for the impecunious defendant, but for a system of justice based upon the principle of equality before the law.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 201

ROBERT DRAPER and RAYMOND LORENTZEN,
Petitioners,

v.

WASHINGTON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENTS

JOSEPH J. REKOFKE
JOHN J. LALLY, Prosecuting Attorney
GEORGE A. KAIN, Deputy Prosecuting Attorney

Attorneys for Respondents

Spokane County Court House
Spokane, Washington

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BRIEF FOR THE RESPONDENTS

RESPONDENTS' STATEMENT OF THE CASE

On the afternoon of July 4, 1960, the three defendants, Draper, Lorentzen and Long, were in Spokane, Washington, and drove an automobile to the home of Robert Jennings, located near Addy, Washington, approximately fifty miles north of Spokane. When they arrived at the Jennings' residence, the defendant, Robert Draper, went inside, and, after some conversation there with Robert Jennings and his mother, Gladys Allen, Draper persuaded Jennings to accompany him back to Spokane with the other two men

(R. 21). When they returned to Spokane, they went to a room at the Davenport Hotel which Robert Draper had rented earlier that day, using the name "J. Radde" (R. 21). In this hotel room in the late evening of July 4, 1960, these four men planned in advance to commit the armed robberies of the TraveLodge Motel and the Downtowner Motel, both in Spokane. For this purpose the four men even went to the extent of making a "dry run" over the exact route later taken in the actual robberies for the purpose of planning and timing these holdups (R. 21).

At approximately 1:50 a.m. of July 5, 1960, the four men drove in an automobile to the TraveLodge Motel, located in downtown Spokane (R. 19). The evidence reflected that this TraveLodge Motel was owned and operated as a motel business by a partnership consisting of H. E. Swenson, Dr. C. W. Anderson and the TraveLodge Corporation, doing business under the name of the TraveLodge Motel, and further that at this early hour of the morning of July 5, 1960, the only employee on duty at the motel was the night clerk, Robert Deurbrouck (R. 24). When the four holdup men drove in front of the TraveLodge Motel, the defendants, Raymond Lorentzen and James Long, went in (R. 19). Each man, being armed with a loaded gun, held up Robert Deurbrouck and obtained from him approximately $500.00, which belonged to the TraveLodge Motel (R. 19). Thereupon, for no reason what-

ever, James Long then ordered Deurbronck to turn around and, when the latter did so, Long struck the night clerk over the head with the butt of a gun, inflicting a scalp wound which later required four stitches (R. 19-20).

Lorentzen and Long then ran back to the waiting vehicle, where the defendant, Robert Draper, and the accomplice, Robert Jennings, were waiting by prearrangement, and, in accordance with this prearranged plan, the defendant, Robert Draper, drove this automobile a few blocks south in the heart of downtown Spokane to the Downtowner Motel. At this motel, the accomplice, Robert Jennings and the defendant, James Long, went inside, each again armed with a loaded weapon, and held up the night clerk on duty at the Downtowner Motel, a young man by the name of Barry Roff (R. 20). Evidence showed that the Downtowner Motel is a corporation engaged in the general motel business in Spokane (R. 24). This holdup netted the four men approximately $1,800.00 (R. 20). Robert Jennings then repeated what had been inflicted upon Robert Deurbronck a few minutes earlier, and struck the clerk, Barry Roff, over the back of the head with the butt of a gun (R. 20). The two holdup men then ran back to the waiting automobile which was being driven by Robert Draper and in which Raymond Lorentzen was waiting with Draper, and they drove off (R. 20).

As they did so, a police officer, Donald Rafferty, who was on patrol in the downtown area of Spokane, observed Jennings and Long run from the motel and jump into the waiting automobile, so Officer Rafferty followed this vehicle for a few blocks until he heard over his police radio that there had been a holdup at the Downtowner Motel (R. 20). Officer Rafferty then tried to stop the vehicle, but it took off at a high rate of speed, with Officer Rafferty in pursuit. Another police officer, Robert Bailor, joined the pursuit over a distance of many blocks in downtown Spokane, and as the pursuit was under way at speeds of up to sixty miles an hour, the defendants fired a number of pistol shots at the pursuing police cars (R. 20). Finally, this vehicle being driven by Draper was rammed by Officer Bailor's police car at an intersection. This, of course, took place only a minute or so after the holdup of the Downtowner Motel (R. 20). In the ensuing melee, Robert Draper and Robert Jennings fled and escaped, but the defendants, Lorentzen and Long, were captured at the scene of the collision, along with the complete proceeds of the two robberies (R. 20). This included other property, which was identified at the trial as coming from the TraveLodge Motel and the Downtowner Motel by employees of the respective motels (R. 20). Long immediately confessed his participation in these robberies (R. 20).

When Draper and Jennings fled, they returned to Draper's room at the Davenport Hotel, where they spent the remainder of the night of July 4-5, 1960. Draper had previously registered at the hotel under the name "J. Radde" (R. 20, 21, 26). The next morning, Draper left the Davenport Hotel and booked a flight to Seattle, Washington, on a Northwest Airlines plane, using the name "J. Radde." When apprehended the following day in Seattle, he still had in his possession the airline ticket under the name of "J. Radde" (R. 21).

The accomplice, Robert Jennings, entered a plea of guilty to the aforementioned two counts of robbery in the Superior Court, on July 19, 1960, and was sentenced to not more than twenty years' confinement on each count, the sentences to run consecutively (R. 21).

The accomplice, Robert Jennings, testified at the trial of these three defendants to every detail of the preparation, planning and execution of the two robberies, as well as the subsequent flight of himself and Robert Draper (R. 21). His testimony was confirmed by the testimony of his mother, Gladys Allen, who identified Draper as having been at the Jennings' residence on the afternoon of July 4, 1960 (R. 26).

The trial of Draper, Lorentzen and Long was held on September 12, 13 and 14, 1960 (R. 19). After the state rested its case, the defendants did not take the stand and offered not a word of testimony or evidence

in their own behalf (R. 22). The jury returned verdicts of guilty on each count as to each of the three defendants, and, on September 30, 1960, they were sentenced to serve not more than twenty years in the Washington State Penitentiary on each count, the sentences to run consecutively (R. 23).

A notice of appeal was filed on the 20th of October, 1960, by each of the petitioners (R. 8, 9). Thereafter, and on the 28th day of November, 1960, a hearing was held before the sentencing Judge, the Honorable Hugh H. Evans, Judge of the Superior Court for Spokane County (R. 23, 32). This hearing was on the defendant's motion and affidavit *in forma pauperis* for a free transcript and statement of facts (R. 10-13, 32). The state filed a counter-affidavit resisting the motion for a free statement of facts. This counter-affidavit set forth the essential facts brought out in the trial (R. 19-22). Present at this hearing were the petitioners and their attorney, Mr. Thomas F. Lynch (R. 32, 33). Mr. Lynch had been appointed to defend Draper, Lorentzen and Long in the jury trial, inasmuch as they had chosen Mr. Lynch to represent them and, because they had insufficient funds, a court-appointed attorney was necessary, and the trial court appointed Mr. Lynch in that capacity (R. 33-34). At the hearing on the motion to proceed *in forma pauperis* and for a free transcript and statement of facts, the Attorney, Thomas F. Lynch, and petitioner, Robert Draper, were asked

questions by the trial Judge which related to the factual basis for the petitioners' contentions of error, and to which questions the petitioners could supply no answers. The attorney and the petitioner, Robert Draper, made extended arguments before the trial Court during this hearing (R. 34-39, 39-45).

On the 12th day of December, 1960, the aforesaid Judge, having concluded that the contentions of the petitioner were frivolous, entered findings of fact and conclusions of law based upon the previous hearing, and also entered an order denying the motion for a free transcript and statement of facts (R. 23-30).

On the 13th day of February, 1961, petitioners obtained an order for writ of certiorari from the Supreme Court of the State of Washington to review the order denying a free transcript and the statement of facts. In this order the trial court was directed to deliver the stenographic report of the hearing conducted in the trial court and a transcript of all proceedings relative to the motion for a free statement of facts in accordance with the rules announced in *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959) (R. 58, 59).

The Supreme Court of the State of Washington had before it for consideration respecting the facts: The petitioners' motion and affidavit (R. 10-13), the State's counter-affidavit (R. 19-22), the reporter's

transcript of the factual summary of both the state and the petitioners during the hearing on the motion for free statement of facts (R. 32-53), and the trial court's findings of fact (R. 23-28). The facts as found by the trial court were not challenged by the petitioners.

On September 28, 1961, Department One of the Supreme Court of the State of Washington, all five judges concurring, rendered an opinion quashing the writ of certiorari (R. 77-82). Petitioners' attorney, Thomas F. Lynch, also appeared on behalf of the petitioners in argument on the writ of certiorari. The official report of this opinion, specifying appearance by counsel, is found at 58 Wn. (2d) 830, 365 P. (2d) 31 (1961).

QUESTIONS PRESENTED

Whether Equal Protection of the Law and Due Process of Law is denied to an indigent defendant by the State of Washington requiring the observance of those minimal requirements as set forth in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), as a condition to the granting of a free statement of facts on appeal.

ARGUMENT

I.

Due Process of Law and Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution do not require a State to supply a free transcript of the trial record to all indigent defendants who merely ask for the same.

That appellate review of a conviction entered by a state court is not essential to due process of law is established by the case of *McKane v. Durston*, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1893).

A review of the cases decided by the Supreme Court of the United States over the past seven years, commencing with the case of *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955), leaves little doubt that the dictates of due process require that, if a state does choose to grant appellate review, that state cannot at the same time deny appellate review to an indigent defendant merely because of his poverty.

The majority opinion in the *Griffin* case, *supra*, contains the following language:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it . . . The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

In the concurring opinion of the *Griffin* case, *supra*, Justice Frankfurter implemented language intended to limit the indiscriminate expenditure of public funds:

> "When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

The foregoing language appears to be a suggestion that state courts create, by rule making power, some definite standard for enabling the indigent defendant, who possesses meritorious grounds for appeal, to perfect his appeal, and without violation of due process of law or equal protection of the laws, to prevent the squandering of public funds in those cases where an appeal would be a patently frivolous act.

The Supreme Court of the State of Washington in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), set forth standards intended to solve this problem. In the *Woods* case, *supra*, all nine judges of the Supreme Court of the State of Washington concurred in an opinion setting forth the standards for determination of the question as to whether a full statement of facts is essential to an

appeal in a particular case. As a prelude to setting forth those rules, the court held that:

> "Where an indigent defendant desires to exercise his right of appellate review, a court may protect his right without approving the expenditure of public funds for an unnecessary portion of the stenographic transcript of the evidence. The wanton expenditure of the taxpayers' money on an appeal made without serious purpose is not a right envisaged by our state constitution.
>
> "...
>
> "However, in *Farley v. United States*, 354 U.S. 521, 1 L. Ed. (2d) 1529, 77 S. Ct. 1371, the court held that leave to appeal *in forma pauperis*, upon the conviction of a crime, could not be denied on the grounds that the appeal was frivolous where the defendant's contention was that the evidence was insufficient to sustain the conviction, the court stating that it was quite clear that the appeal could not be characterized as frivolous.
>
> "Since *Griffin v. Illinois*, *supra* (1955), the extent of the right of an indigent defendant to obtain a free statement of facts to insure him an adequate appellate review has been a recurring and troublesome question. The difficulty has arisen because of the lack of precedent to guide the trial courts in considering the substantiality of the errors claimed, and in determining what portion of the record is necessary to adequately review the claimed errors.
>
> "To aid the trial court in passing upon these matters, this court hereby prescribes the following procedure:

"1. An indigent defendant in his motion for a free statement of facts must set forth:

"a. The fact of his indigency

"b. The errors which he claims were committed; and if it is claimed that the evidence is insufficient to justify the verdict, he shall specify with particularity in what respect he believes the evidence is lacking. (The allegations of error need not be expressed in any technical form but must clearly indicate what is intended.)

" . . .

"3. The trial court in disposing of an indigent's motion for a statement of facts at county expense shall enter findings of fact upon the following matters:

" . . .

"b. Which of the errors, if any, are frivolous and the reasons why they are frivolous."

The purpose of the rule as set forth above, in part, is to require, prior to the expenditure of public funds, that the defendant specify with particularity what evidence he feels is insufficient. The reason for this rule is obvious. If all that a defendant must do to obtain a statement of facts at public expense is to allege in general that the evidence is insufficient, or that substantial error occurred, then all applicants for a transcript would undoubtedly make such allegation. The allegation can be made no matter how spurious

its foundation and no matter how groundless the appeal. To require the public to provide a statement of facts on the mere assertion by a defendant that the evidence is insufficient, or that trial errors occurred, in practice, is equivalent to requiring the public to provide a statement of facts or transcript in all cases. This court, in the case of *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955), made it clear that this is not intended.

The rule set forth by the Supreme Court of the State of Washington in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), provides a workable solution to this problem. That rule imposes no unreasonable burden on the defendant in requiring him to enumerate exactly what evidentiary deficiency occurred in the trial. At the same time, the rule permits the courts to relieve the public of the expense of frivolous appeals. The respondent submits that this rule is reasonable and fair to the indigent defendant and the public alike.

II.

The Washington case of In re Woods v. Rhay equates a monied defendant and an indigent defendant with respect to the restrictions on the preparation of a transcript for the purposes of appeal.

The petitioners contend that the rules as set forth by the Supreme Court of the State of Washington in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P.

(2d) 332 (1959), result in a denial of due process of law and equal protection of the law, because an indigent defendant has only a conditional right to appeal, whereas a defendant with money suffers no impediment to an appeal on the merits. The argument of petitioners, in effect, is that any time an indigent defendant asks for a free transcript and statement of facts, the trial court has no choice but to grant this request. However, as previously indicated, the case of *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955), did not so hold.

The practical result of the case of *In re Woods v. Rhay, supra*, is that the indigent and a defendant with money are equated with respect to the taking of an appeal. A defendant who has sufficient money to pay for a transcript on appeal must reach a decision with regard to whether it is feasible to appeal from his conviction. His decision is obviously restricted by a desire not to throw good money after bad. If the appeal would be a useless thing, obviously the rich man will not appeal. In effect, then, a defendant who is financially able to prosecute an appeal is deterred when the appeal would be a useless act.

An indigent defendant has no such monetary restrictions upon his decision to prosecute an appeal, since he draws on the State's Treasury which to him is inexhaustible. The Supreme Court of the State of Washington in the case of *In re Woods v. Rhay, supra*, set

forth rules for the purpose of equating the two considerations just mentioned. In the case of *In re Woods v. Rhay*, *supra*, the Supreme Court of the State of Washington requires only that the petitioner seeking a free statement of facts set forth the error allegedly committed by the trial court so as to "clearly indicate what is intended." The Supreme Court of the State of Washington then has an opportunity to review the trial court's decision on the motion for a free statement of facts for the ultimate determination as to whether as a matter of law the appeal would be a frivolous one.

It is submitted that this requirement places no undue burden on the indigent defendant. It does not favor the defendant who is able to pay for his own statement of facts, but equates the rich man's sense of thrift in the face of futility with the indigent defendant's duty to make a minimal showing that the State's money would not be spent for a completely useless act. The case of *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955), in substance, requires that the State must provide *as* adequate appellate review for the indigent defendant as it provides for a defendant with money. The *Griffin* case, *supra*, did not hold that the State must provide *more* adequate appellate review for the indigent.

The petitioners assert that in the State of Washington there is no provision restricting the appeal of a

defendant with money. However, Rule 51 of Rules on Appeal, RCW, Vol. "O," Appeal — p. 28, provides as follows:

> "Motion to dismiss. Any respondent may move the supreme court to dismiss an appeal . . . *on any ground going to the merits of the further prosecution of the appeal* . . . ; and there may be combined with a motion to dismiss, a motion to affirm the judgment or order appealed from, or a motion for damages on the ground that the appeal was taken merely for delay . . . "

It thus appears that, if a monied defendant appealed on a basis which was legally inadequate, his appeal could be stricken by summary action in the State of Washington. Respondents were unable to find any decision of the Supreme Court of the State of Washington which involves a criminal case construing this court rule.

III.

Washington Practice, by virtue of the Case of In re Woods v. Rhay, does not result in a summary denial of a free transcript by the same trial court that denied the motion for post-trial remedies.

The petitioners contend that the Washington practice results in an arbitrary denial by the trial court of an indigent defendant's right of review because, in practical effect, the Supreme Court of the State of Washington reviews nothing but the trial court's conclusion.

The petitioners contend that the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), suffers from the very same inadequacy that caused this court to reverse the case of *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 2 L. Ed. (2d) 1269, 78 S. Ct. 1061 (1958). In *Eskridge v. Washington State Board of Prison Terms and Paroles, supra*, at p. 215, the opinion states:

> "The trial judge denied this motion, finding that 'justice would not be promoted . . . .'"

This procedure provided the Supreme Court of the State of Washington with nothing to review other than the trial court's conclusion, and the Supreme Court of the State of Washington had absolutely no factual background upon which to evaluate the trial court's decision.

The case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), makes it clear that the Supreme Court of the State of Washington was seeking to remove those objections which this court made in the case of *Eskridge v. Washington State Board of Prison Terms and Paroles, supra*. In the State of Washington, under the rules set forth in the case of *In re Woods v. Rhay, supra*, the trial court does not merely conclude that the appeal would be a frivolous one, but the trial court must make findings of fact as well as conclusions.

The denial of such a motion by the rules themselves permits a review to the Supreme Court of the State of Washington. The Supreme Court of the State of Washington has the following factual matter to review when considering the trial court's denial:

1. The petitioner's affidavit attached to the motion to proceed *in forma pauperis*.
2. The State's affidavit resisting the aforesaid motion.
3. The reporter's transcript of the facts as brought out in oral argument at the hearing on this motion in the trial court.
4. The trial court's findings of fact.
5. The facts alleged in the briefs of both parties, filed in the Supreme Court of the State of Washington.
6. The facts as orally argued by both parties before the Supreme Court of the State of Washington.

It is clear from the record that the Supreme Court of the State of Washington permits the consideration of additional facts raised for the first time before that court (R. 81):

> " . . . these allegations are too broad and indefinite to indicate what specific erroneous rulings of the court the defendants had in mind, and *they*

have not been made more definite by the briefs before this court." (Emphasis supplied.)

The final determination, even on the facts, is not made in the trial court, but is made in the Supreme Court of the State of Washington. Therefore, there is no summary denial by the trial court of a defendant's request for a free statement of facts under the existing Washington practice. The respondents submit that the rules presently in effect in the State of Washington, as set forth in *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), meet the requirements imposed on the states under the Equal Protection of Law and Due Process of Law clauses of the Fourteenth Amendment to the United States Constitution.

IV.

Petitioners, by reason of their refusal to follow the rules set forth in the case In re Woods v. Rhay, prevented the trial court from designating any part of the trial record as necessary for appellate review.

The petitioners, Mr. Draper and Mr. Lorentzen, did not observe the rules as set forth in *In re Woods v. Rhay, supra*, in the respect that they set forth errors which they claimed were committed, but the specifications did not "clearly indicate what is intended," and they did not "specify with particularity in what respect he believes the evidence was lacking." The petitioner, Mr. Draper, was aware of these rules (R. 40, 43). The petitioner's counsel was also familiar with

this case (R. 36). The petitioner's attorney, who was an experienced criminal lawyer, was unable to specify any error, with minor exceptions which were legally inadequate. Respondents submit that the reason for this inability was that there was no factual basis for any of the claims of error.

The petitioner, Mr. Draper, sought to circumvent this inability to specify any real error by the following means: The petitioners had a capable attorney, who represented them in presenting the motion, and before the Supreme Court of the State of Washington, but rejected the services of this attorney after the convictions resulting in the trial court. The petitioners thus placed themselves in the position of being indigent laymen without the advice of counsel, and the petitioner, Mr. Draper, made this quite clear to the trial court (R. 34, 39). This permitted him to argue that he was unqualified to specify what errors, if any, had been committed, as was required by the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959). The petitioner, Mr. Draper, then argued before the trial court that, because he had no attorney and no legal training, it was necessary for him to read the whole record in order to be able to specify the trial court's error, and that, therefore, he must have the whole statement of facts to comply with the rules set forth in *In re Woods v. Rhay, supra*, (R. 39, 44).

The purpose of the rules set forth in *In re Woods v. Rhay, supra*, was to require the indigent defendant to advise the trial court of the error alleged so that, if the allegation was not a frivolous one, the trial court would then be in a position to designate that portion of the statement of facts necessary for appeal. The petitioners made it impossible for the trial court to designate any part of the record as necessary to perfect an appeal.

The petitioners complain that the trial court should have made a finding with respect to whether a narrative statement would be adequate. The petitioner, Mr. Draper, made it clear to the trial court in his oral argument that he would not accept a narrative statement of facts. He made it clear that he wanted *only* the official transcript and that he wanted *all* of the official transcript to browse through (R. 39):

> "I will have to have the entire record in order to enable me to prepare my appeal, and anything less than that would be denying me what I need to proceed upon, and the two men charged here with me would need the same thing. We have no funds with which to hire a lawyer to prepare an appeal, or to prosecute it, and without this record we have nothing to work from, and nothing to work on.
>
> "I don't know what the law says, I must just look through all the record to find what I need, and I want all of it transcribed to start from."

The trial court, during the hearing on the motion for a free transcript, asked various questions in order to properly lay the foundation suggested in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 322 (1959). Neither the counsel for the petitioners nor the petitioners were able to answer the questions because there was no basis in fact for the allegations of error. A good example of this is indicated by the colloquy that occurred during the argument when the petitioner, Mr. Draper, alleged that witnesses were in the court room after the rule of exclusion was in effect (R. 43):

> "The Court. You have affidavits of someone that these two people were in the courtroom, these witnesses, who were not supposed to be?
>
> "Mr. Draper. Yes, that is right.
>
> "The Court. Where are they?
>
> "Mr. Draper. I have talked to them. I didn't know that an affidavit was proper, so I didn't get one.
>
> "The Court. Who are they?
>
> "Mr. Draper. I don't have to answer that, and I am not going to answer that."

The trial court could hardly be in a position to specify what portion of the record should be made available to the petitioners, if the petitioners would not advise the court of anything more than a bare

claim of error. The respondents submit that the inability of the petitioners to "clearly indicate what is intended" with respect to their claims of error is due to a factual absence of any basis for these claims.

V.

The petitioners, as a matter of law, had no basis upon which to prosecute an appeal and, consequently, the final decision of the Supreme Court of the State of Washington was a proper one.

Petitioners, in their brief, argue only four of the thirteen original allegations of error. These allegations of error and their disposition will be hereinafter set forth:

With respect to allegation of error No. 6 (R. 41):

> " . . . that the trial judge was prejudiced against the defendants throughout the entire trial."

the petitioners' attorney mentioned this allegation to the trial court, but said nothing about it (R. 37). The petitioner, Mr. Draper, mentioned this allegation to the trial court, but could supply no information as to the basis for the claimed error (R. 41). The trial court indicated that petitioners had not supplied him with any information as to any facts pertaining to this allegation of error (R. 50). The allegation of error did not "clearly indicate what is intended." This was

an obvious disregard of the rules set forth in *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959). The Supreme Court of the State of Washington, in reviewing the foregoing disposition, held that the petitioners, as a matter of law under these facts, had no basis to appeal, citing *State v. Innocenti*, 170 Wash. 286, 16 P. (2d) 439 (1932). The Supreme Court held that this assignment of error was patently frivolous (R. 80, 81).

With respect to the allegation of error No. 7 (R. 41):

> " . . . that the trial judge should have dismissed the case as the defendants are not guilty as charged,"

again, the petitioners did not indicate what insufficiency occurred in the evidence, but made only the conclusion (R. 41):

> "The basis of the case was not upheld, it should have been dismissed and dropped."

The rule in *In re Woods v. Rhay, supra*, to the effect that the petitioner shall "specify with particularity in what respect he believes the evidence is lacking" was not observed by the petitioners. The Supreme Court of the State of Washington, when reviewing this allegation of error, held as a matter of law that the evidence was sufficient under the facts (R. 79, 80):

"It is clear from the summary of the evidence which the trial court outlined in its order, *the correctness of which outline the defendants do not challenge*, that all of the elements of the crime of robbery were established by the evidence. (Emphasis supplied).

" . . . The evidence outlined above, which the jury was entitled to believe, was sufficient proof to support the convictions."

While the petitioners did contend to the trial court that there was a failure to prove that the victims of the robberies had corporate status, the Supreme Court ruled against this contention as a matter of law. The proof of ownership of property involved in a robbery is unnecessary. Citing *State v. Hatch*, 63 Wash. 617, 116 Pac. 286 (1911) (R. 81).

The petitioners alleged that the trial court committed error as set forth in assignment of error No. 8 (R. 41):

". . . that exhibits were entered over objections that should not have been allowed to be entered."

The petitioner, Mr. Draper, by way of indicating what he intended regarding this allegation of error, had only this to say (R. 41):

"You can't just bring something into court and say, 'This is so and so,' and establish a fact that way, but that is what happened with half of the evidence that was used here."

The petitioner, Mr. Draper, argued that there was no continuity of possession of the exhibits, and then stated (R. 40):

> " . . . and I know that the Courts have great discretion as to what things to admit and what things not to admit . . ."

The petitioners' attorney himself stated with respect to a gun admitted in evidence (R. 38):

> "I suppose that goes to the weight of the evidence here."

Nothing further from a factual basis was mentioned by the petitioners or their attorney with respect to this allegation of error. The Supreme Court of the State of Washington in reviewing this allegation of error held (R. 80):

> " . . . it is stated that the clothes and weapons introduced in evidence were not properly identified nor their ownership established. This goes to the weight of the evidence and not to its admissibility."

They further held (R. 81):

> " . . . these allegations are too broad and indefinite to indicate what specific erroneous rulings of the court the defendants had in mind, and they have not been made more definite by the briefs before this court."

The petitioners, by way of allegation of error No. 9, asserted (R. 41):

". . . that testimony was allowed over objections that should not have been allowed."

The petitioner, Mr. Draper, set forth the facts upon which this contention was based as follows (R. 41):

> "I think that speaks for itself. There is testimony which was objected to but which was allowed to stand, and in some cases you instructed the reporter to have it stricken from the record, and there was nothing in the instructions to contradict that, and any time you speak in court, that is an instruction, if it is not directed to the prosecutor or to defendant's counsel, the jury listens to it all.
>
> "The Court. What did I say?
>
> "Mr. Draper. If you offer an opinion, or a thought, or anything to show how you feel.
>
> "The Court. What did I do?
>
> "Mr. Draper. I don't remember, because I don't have the transcript, but I remember a very great feeling at the time of the trial over this."

The petitioner, Mr. Draper, also contended that the witness, Jennings, had perjured himself, but was unable to indicate anything with respect to what testimony was perjured or when it occurred in the trial (R. 40, 41). The trial court held that there was no showing of any testimony having been improperly admitted (R. 27, 28). The Supreme Court of the State of Washington in reviewing this allegation of error held that (R. 81):

> " . . . these allegations are too broad and indefinite to indicate what specific erroneous rulings of the court the defendants had in mind, and they have not been made more definite by the briefs before this court."

The Supreme Court of the State of Washington also held that, when the contention is that perjury was committed by a witness (R. 80):

> " . . . it is for the jury to decide which witnesses, if any, are to be believed."

Thus, it appears that the Supreme Court of the State of Washington, after having reviewed all of the facts as alleged in the affidavits, briefs and arguments of each side, as well as the findings and conclusions of the trial court, came to the conclusion either that the petitioners were precluded as a matter of law from appealing upon the basis they alleged, or that they had failed to clearly indicate what is intended by their allegations of error, in violation of the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959).

The Supreme Court of the State of Washington, in the case of *In re Grady v. Schneckloth*, 51 Wn. (2d) 1, 314 P. (2d) 930 (1957), held that the State of Washington had never required the statement of facts on appeal to contain a stenographic transcript of the entire evidence taken in the trial court. The Supreme Court of the United States denied certiorari. *Grady v. Rhay*, 357 U.S. 939, 2 L. Ed. (2d) 1554, 78 S. Ct. 1391 (1958).

The Supreme Court of the State of Washington, in the case of *State v. Lewis*, 55 Wn. (2d) 665, 349 P. (2d) 438 (1960), held:

> "... if an indigent defendant is represented by counsel who defended him at the trial, he is not entitled to a statement of facts at public expense where the assignments of error are patently frivolous and where, as here, the furnishing of a statement of facts would result in the waste of public funds."

It should be borne in mind that petitioners never contended that the facts, as set forth in the findings of the trial court, were untrue or inaccurate and did not challenge the correctness of those findings (R. 78).

The petitioners indicate at page 21 of the Brief of Petitioners that, if a free statement of facts is provided for all indigent defendants who request it, the cost to the State will be of little consequence. However, when the cost of printing a record, as indicated on page 18 of Petitioners' Brief, is compared with petitioners' statement, on page 15 of their brief, to the effect that at least fifty percent of all defendants are indigent defendants, it becomes obvious the conclusion reached by the petitioners that "the cost to the State of employing a court reporter to transcribe his notes is inconsequential . . ." is an inaccurate statement. If the State of Washington is not permitted to segregate the frivolous appeals from the non-frivolous appeals prior to the preparation of a free statement of facts

and, when fifty percent of the vast number of defendants before the courts need only allege that the evidence is insufficient to support the conviction in order to draw upon the public treasury, even though their claim is made in total bad faith or their cause is absolutely hopeless as a matter of law, then this certainly will provide a serious drain upon the treasury of this State.

The extent to which one defendant may pursue litigation at the expense of the State is indicated in a letter from the petitioner, Mr. Draper, to the Honorable Robert C. Finley, Chief Justice of the Supreme Court of the State of Washington, in which letter the petitioner stated (R. 74):

> "I believe my affidavit of pauperis is complete. The fact that I have been recognized in five courts should dispell argument on that point."

It is suggested that there is a remedy for those who insist on pursuing frivolous litigation, but, if this remedy by way of dismissal occurs after the preparation of a costly statement of facts, it cures nothing. The case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), seeks to eliminate patently frivolous appeals before this expense is incurred, and yet, at the same time, requires only a minimal showing of good faith on the part of the indigent defendants.

CONCLUSION

The case of *In re Woods v. Rhay, supra*, provides a method whereby the State of Washington can insure to indigent defendants a statement of facts with which to appeal if a slight showing of good faith is made and, at the same time, deprives the trial court of the ability to arbitrarily deny an indigent defendant a free statement of facts with which to prosecute the appeal. This process equates the restrictions existing with respect to a monied defendant with the lack of any restriction respecting a defendant who asks the state to pay for this record. The State of Washington thereby protects its treasury without denying Due Process of Law or Equal Protection of the Laws to these petitioners. The respondents request that the relief sought by the petitioners be denied and that the decision of the Supreme Court of the State of Washington remain in full force and effect.

Respectfully submitted,

JOSEPH J. REKOFKE
JOHN J. LALLY, Prosecuting Attorney
GEORGE A. KAIN, Deputy Prosecuting Attorney

Attorneys for Respondents

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 201

ROBERT DRAPER and RAYMOND LORENTZEN,

Petitioners,

vs.

WASHINGTON, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONERS' REPLY BRIEF

CHARLES F. LUCE
Attorney for the Petitioners
1002 N. E. Holladay Street
Portland 8, Oregon

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Argument

Respondent states the question to be the validity of the rules of Washington governing appeals *in forma pauperis* set forth in *In re Woods* v. *Rhay*, 54 Wash. 2d 36 at 44-45 (Br., p. 8). We agree that the validity of these rules, *as applied in this case*, is a question for decision by the Court. But we point out that in the application of these rules the respondent and the trial court seemingly overlooked important parts of them. Section 2 of the rules requires that, "If the state is of the opinion that the errors alleged can properly be presented on appeal without a transcript of all the testimony," it either specify to the trial court the

portion it thinks will be adequate or show that a narrative statement will be adequate and available to the defendant (54 Wash. 2d at 44-45). The record fails to show that the state took any cognizance of this portion of the rules. Section 3 of the rules requires that, "The trial court in disposing of an indigent's motion for a statement of facts shall enter findings of fact upon * * * (c) whether a narrative form of statement of facts will be adequate . . . and . . . available to the defendant; and, if not (d) what portion of the stenographic transcript will be necessary to effectuate the indigent's appeal" (54 Wash. 2d at 45). The trial court did not make such findings of fact (R. 23-31).

In its brief, respondent seeks to excuse the trial court's omission by the assertion that one of the petitioners, Mr. Draper, "made it clear . . . that he would not accept a narrative statement of facts," etc. (Br., p. 21). But Mr. Draper was speaking only for himself, not for the petitioner Mr. Lorentzen (R. 34). Further, we cannot read Mr. Draper's argument that he needed a full transcript as a waiver of his right to anything less than a full transcript (Br., pp. 21-23; R. 39-45). Although we believe it would not have been adequate, the trial court could have made a more meaningful record for the petitioners' appeals if, as a minimum, it had requested the court reporter to transcribe each of the state's offerings of proof which were allowed over petitioners' objections.

Respondents argue, also, that petitioners should be denied the right of appeal because they did not specify in sufficient detail the errors which they claim were committed by the trial court (Br., pp. 19-28). The record shows, we believe, that petitioners specified these errors as well as they could in the absence of a transcript (R. 10-13, 35-45). If indigent appellants in order to obtain the same right of appeal as moneyed appellants must recall with particularity each error committed in the course of trial, they

indeed have been denied Equal Protection of the Law. Not even experienced counsel could perform such a feat of memory unless he were blessed with total recall. The need for a complete transcript to enable counsel to evaluate a possible appeal has been well described by Mr. Bennett Boskey,

> "Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently, issues simply cannot even be seen—let alone assessed—without reading an accurate transcript. Particularly is this true of questions relating to evidence or to the judge's charge; and it may also apply to many other types of questions. Moreover, the actual record (if appellate counsel could have it to inspect) might disclose issues substantial enough to constitute probable or possible 'plain error,' even though trial counsel was not aware of their existence; and the indigent should have the same opportunity as the wealthy to urge that plain error should be noticed on appeal. In short, a conscientious counsel freshly entering the case at the appellate stage normally is likely to conclude that a full or partial transcript of the trial proceedings will be indispensable if the requisite 'dependable record' is to be obtained as a basis for evaluating the case." Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 793 (1961).

Respondent's argument in defense of the rules of Washington restricting appeals by indigents rests mainly on its Point II, which asserts,

> "The Washington case of In re Woods v. Rhay equates a monied defendant and an indigent defendant with respect to the restrictions on the preparation of a transcript for the purposes of appeal" (Br., p. 13).

In more detail, respondent's argument runs thus: "If the appeal would be a useless thing, obviously the rich man will not appeal." He does not wish "to throw good money after bad" (Br., p. 14). A poor person "has no such monetary restriction upon his decision to prosecute an appeal" (Br., p. 14). It is necessary, therefore, that the State of Washington place special restrictions on poor persons' appeals to screen out those which are "frivolous" (Br., p. 15). The rules announced by the Supreme Court of Washington in *Woods* v. *Rhay* accomplish this purpose in a fair and reasonable way (Br., p. 15). The argument, if accepted, would resolve an important constitutional issue by a speculation in psychology.

We cannot believe that an ordinary man, sentenced to a term in the penitentiary, would decide not to appeal because he wished to save the price of a transcript. Our observation has been that such a man would base his decision principally upon considerations having nothing to do with his pocketbook: the advice of his counsel, his own feelings of guilt or innocence, his desire "to get it over with," his expectations as to the prosecutor's and the trial judge's recommendations to the parole board, the expected attitude of the parole board itself, his age, his health, etc. It is true, of course, there will be exceptional defendants who base decisions to appeal or not to appeal on other considerations, sometimes unworthy considerations. But psychological speculation aside, it would violate the philosophy of the Bill of Rights and the Fourteenth Amendment if this Court were to fashion rules solely for the purpose of preventing the abuse of constitutional guarantees by unscrupulous persons. See *Feldman* v. *United States Oil and Ref. Co.*, 322 U.S. 487 (1944), dissenting opinion of Mr. Justice Black concurred in by Mr. Justice Douglas and Mr. Justice Rutledge, at 494, especially 500-503.

This Court, we believe, disposed of respondent's main argument in *Coppedge* v. *United States*, when it observed,

> "• • • Statistics compiled in the court below illustrate the undeniable fact that as many meritorious criminal cases come before that court through applications for leave to proceed in forma pauperis as on the paid docket, and that a priori justification can be found for considering them, as a class, to be more frivolous than those in which costs have been paid. Even-handed administration of the criminal law demands that these cases be given no less consideration than others on the courts' dockets. • • •." 369 U.S. 438 at 449.

Respondent's attempt to justify the Washington rules by reference to Mr. Justice Frankfurter's concurring opinion in *Griffin* v. *Illinois*, 351 U.S. 12, 24 (1956), misinterprets, we believe, what Mr. Justice Frankfurter had in mind (Br., p. 10). When Mr. Justice Frankfurter spoke of "the growing experience of reforms in appellate procedure" and of "economic modes for securing review still to be devised," we do not believe he was thinking of rules directed solely to reducing the volume of appeals from felony convictions of poor persons. Rather, he was speaking generally of reforms intended to weed out unmeritorious appeals, whether by the rich or the poor. The rules of Washington seek only to reduce the number of appeals by the indigent. The state allows the well-to-do to appeal without limitation except their own "sense of thrift" (Br., p. 15). Such an approach to the problem of screening ill-advised appeals does not square with Equal Protection of the Laws or Due Process of Law.

Respectfully submitted,

CHARLES F. LUCE
Attorney

January 1963